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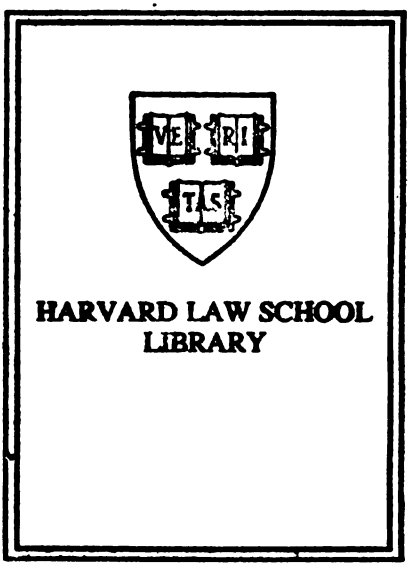

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37.

MICHIGAN REPORTS

5
May 8

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JUNE 4 TO SEPTEMBER 23 1884

HENRY A. CHANEY
STATE REPORTER

VOL 54

CHICAGO
CALLAGHAN & CO
1885

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SUPREME COURT RULE 34.

At a session of the Supreme Court on October 27, 1885, it was *ordered* that Supreme Court Rule 34 be amended to read as follows:

RULE 34. In the argument of causes two counsel may be heard on each side. The time allowed for argument on each side shall not exceed two hours, unless by special permission of the Court, on cause shown. Upon hearing of special motions, or orders to show cause, only one argument upon a side will be heard, and the time to be occupied in argument is limited to fifteen minutes on a side, unless by special leave of Court the time is extended.

And it was further ordered that the amended rule take effect January 5, 1886.

Rec. Jan. 26, 1886

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MR. JUSTICE COOLEY.

At the opening of Court on the morning of Tuesday, October 13, 1885, a portrait by Lewis T. Ives of the Honorable Thomas McIntyre Cooley, lately Chief Justice of the State of Michigan, was presented to the Court by the State Bar.

Mr. HENRY F. SEVERENS, speaking for the Bar, addressed the Court as follows:

May it please your Honors:

The Bar of the State, foreseeing the approaching retirement from the bench of Judge Cooley, their friend and the associate of your senior members, have considered how they might bring here some token of their kind regard for him, which might be commemorative also of an event so adapted to cast the hue of sadness over us, breaking, as it does, the associations of so many years.

Among the distinguished men whom our young and thrifty Michigan has already contributed to the history of the time the recent Chief Justice of the Court holds a prominent and honorable place. I am sure your honors will not think I pass beyond the bounds of what may fitly be said of one yet living if on this occasion I speak of the illuminated record our brother has made, and in doing so press no fact beyond its fixed and well-known place.

In the products of that faithful zeal in his professional work, and that wonderful facility for accurate execution, which seems like a gift of genius, we all share advantages which it is a duty as well as a pleasure to acknowledge. We do not ignore his fame as an author of the highest repute in various branches of legal and historic lore, but it is rather of him as a member of the Court that we wished to speak to-day. Fifty volumes of your reported decisions bear witness to the

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great value of his services to the State as an essential component of the Court. I count the early period when he was its Reporter, for a good reporter is almost the equivalent of a good judge.

The jurisprudence of the State, which was at the beginning of his official life in a plastic state, has taken form and mould, and it is needless here or elsewhere to recount how much he has done to help in the perfecting of our system of law, and to establish the high character which he and his associates have created for the Court in the respect of the profession and people, not only of our own State, but in other states and countries wherever a kindred system of law and government prevails. And how grand is the work in which he shared of laying deep and strong the foundations of the order and justice of a new State!

Since he came into the Court an almost infinite variety of questions, ranging from those occurring in the daily life of the people to those of the highest import to society, have here been solved. In the forensic struggles of opposing interests and the judicial recognition and adoption of the sound and durable, and burning away of what was fictitious and unsubstantial, the clear and glowing light of justice has shone above the clouds of self-interest and error.

While the truth could soar hither with an abiding confidence, full many a Dædalus has seen the waxen wings of his own construction melted away in this presence and his offspring tumbled downward into the sea.

Far into the future and beyond our shortened ken, the work he helped to do here will live and animate the growing body of our law as it progresses toward the more perfect form which we may hope the learning and wisdom of his successors may evolve. And beyond our thought of time, the student of the judicial history of the State, and the professional man, searching at the root for the exposition of principles which govern the social life of men, will read his name and see the monument he built for himself in these early reports of the State's dawning years.

Of those who composed the new organization of the Court

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now nearly thirty years ago, but one beloved and honored name remains upon our roll of judges. To him, who has seen so many changes since that time, this retirement of his early associate must be an event of deprivation and sorrow. The other members of the Court will miss his ready familiarity with the work of their predecessors, his sound legal judgment and active aid. To the members of the Bar, who turn loyally to the fealty due to the changed Court, some natural expressions of sadness incident to the change must be excused.

We have wished to preserve the face and lineaments of our friend, and by the hand of another we have caused his portrait to be put upon canvas. And because the Court and Bar have a joint interest in the subject, we have thought it might be as agreeable to your Honors as to ourselves that the portrait should be a part of the belongings of the Court and hang upon its walls.

We trust you will deem the work sufficiently worthy of the subject to grant our request and aid us in making, so far as we can, his face a perpetual presence here.

Mr. Justice CAMPBELL, upon invitation of the Chief Justice, replied as follows:

My associates have desired that I should speak for the Court on this occasion, because I have been longer connected with Judge Cooley than any other member of the Court. I do it with pleasure, at the same time, of course, with other feelings that naturally arise in looking over the long period in which we were associated in one capacity or another. It certainly is a pleasure to us, and a pleasure to everyone, I think, to have perpetuated in this court room the memory of a judge who has done so much to illuminate the law, and who has done so much to give credit to himself in the administration of justice, as well as in other labors not less illustrious.

As one of the original members of the present Supreme Court, it was my pleasure to join with the other members of

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the Court in the unanimous selection of Judge Cooley as our first Reporter. Some of the members of the Court, as then constituted, had not had any personal knowledge of him. Judge Christiancy and myself had known him tolerably well—Judge Christiancy very intimately. We selected him because we had noticed in his management of cases, even in his early standing at the Bar, a very great discrimination in picking out and enforcing the strong and important points in a case. He was able to select from what might possibly appear a confused mass of material that which was really the key to every transaction with a clearness of mind which enabled him to be one of the best reporters, I think by general consent we ever had in the United States.

When a vacancy was created by the death of Judge Manning there was, a general feeling that Judge Cooley as reporter had shown such qualities as would make him fit for a judicial office, and his selection had but very little opposition. From that time to this his career has been an extremely honorable one. It is hardly necessary for me to speak of his labors as a judge as they appear to the outside world. Every one knows what they have been. But I can speak with a great deal of feeling upon his action as a judge outside of the court room, and in association with his brethren. He was not only willing to take upon himself all the labor that fairly belonged to him, but he was always courteous in his demeanor to his associates, and ever ready to listen to argument or any suggestions which they might wish to make. In other words, he was all that any of us could desire as an associate on the judicial bench.

It would hardly be desirable, I think, to dwell upon this subject longer, but I can say with the utmost truth that Judge Cooley's associations with his brethren on the bench were always such as they will remember with pleasure, just as his conduct on the bench is remembered by the outside world, not only with pleasure, but with great respect and reverence.

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Mr. Chief Justice MORSE said:

My acquaintance with Justice Cooley was simply that of a practitioner before this Court. As such a practitioner I most heartily join in every word that has been said in commendation of his ability and integrity as a judge. His name is not only inseparably linked with the law in Michigan, but he has enriched the jurisprudence of his country by his labor and his learning. He has been and is an honor to our State and Nation.

The Court gladly receives this life-like portrait, and will assign it a proper place on the walls of the court room.

The Clerk will enter the proceedings upon the Journal, and they will be published in the Reports.

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EDWIN BYLES v. WILLIAM R. COLIER.

Sale of personalty—Transfer of title.

1. The presumption that title does not pass upon a sale so long as anything remains to be done to determine the sum to be paid, is not conclusive, but may be overcome by such facts and circumstances as indicate a contrary intent in the parties, and the intent is a question of fact and not of law.
2. Where money has been paid upon a sale of personalty that has been set apart for the purchaser by examination and estimate of its quantity, the fact that it must be further inspected in order to determine how much remains to be paid, is not inconsistent with the purpose that the title should pass upon the partial payment.
3. Title may pass without delivery, if the property sold is sufficiently identified and even if something remains to be done to fit it for delivery.
4. The delivery made upon the sale of goods is sufficient, if it is all that the contract of sale contemplated.

Error to Oceana. (Russell, J.) April 29.—June 4.

REPLEVIN. Plaintiff brings error. Reversed.

Fletcher & Wanty for appellant.

Peter Doran and *W. E. Ambler* for appellee.

COOLEY, C. J. Replevin for a quantity of lumber. The plaintiff claimed title to the lumber under a contract made between S. B. Farnsworth, Charles Farnsworth, Addie P. Farnsworth, William Farnsworth and Fanny Whittington, of the first part, and A. W. Byrne, of the second part, dated October 28, 1880, whereby the parties of the first part agreed

*Continued from Vol. 53.

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to cut, haul and saw in their mill at Mears, the timber on certain lands owned by them in Oceana county, and sell the lumber to the party of the second part at certain rates specified for eight separate classes, ranging from four dollars per thousand feet for culls, to twenty-two and twenty-three dollars per thousand feet for the three grades of uppers. The terms of payment were to be one-half as soon as the lumber was piled in the yard, and the balance in ninety days after shipment. The following, among others not necessary to be recited, were special clauses of the contract:

"And it is further agreed that all lumber at all time shall be cut to the order of the party of the second part, in whatsoever shape he may direct. And it is further agreed that the parties of the first part shall not sell or dispose of to any parties any of the above-mentioned grades of lumber, excepting orders that are on the books of the firm on the day of the date of these presents. The parties of the first part reserve the right to remove and dispose of not to exceed (200) two hundred trees suitable for spars. It is agreed that the parties of the second part shall not require the parties of the first part to cut lumber or timbers longer than twenty feet. The inspection that shall govern shall be what is known as Michigan inspection. Each party may furnish an inspector, and in case they disagree then an uninterested party shall be called upon any question that may arise."

November 5, 1880, the party of the second part assigned his interest in the contract to the plaintiff, and in the following July the parties of the first part entered into a contract with George Murphy, whereby he acquired an interest in the first-mentioned contract, the particulars of which it is not necessary to give now. The lumber was cut by Murphy after July, 1881, and piled in the mill-yard, where it was attached by the defendant, who is sheriff of the county of Oceana, by virtue of attachments against Murphy and William Farnsworth, and as their property. The attachment was made February, 2, 1882.

The circuit judge who tried the case finds

"That said lumber had never been measured, but plaintiff, under said contracts, had advanced one-half of the estimated

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value as provided for in said contracts, from time to time, on an estimate made by counting piles on yard each month; that it was the practice of the parties to said contract to measure and inspect the lumber as it was loaded upon the cars for shipment, and this measurement and inspection was recognized and acquiesced in by all parties, and the lumber was paid for in accordance therewith, the plaintiff rendering to second parties in said contract statements of number of cars, quantity and quality of lumber on each, and prices provided for, and making payment of the amount to be paid ninety days from time of shipment, as stated in said contract; this inspection being made by a person satisfactory to both parties. This particular lumber was not so inspected, measured and shipped until some months after it was replevined by plaintiff in this suit. The last of the lumber was manufactured in June, 1882, and had not all been shipped in February, 1883, when the cause was tried. The plaintiff settled with Murphy for the lumber in May or June, 1882, but then the amount was estimated and a sum agreed upon as the sum that should be payable, the entire quantity of the lumber not having been at that time inspected and measured. This settlement was after the replevin suit had been brought. The plaintiff did not claim title to the lumber in question by virtue of any settlement or contract with the Farnsworths and Murphy, but claimed that he became the owner of the lumber manufactured under said contract by the payment of the one-half of the purchase price, as estimated and mentioned in said contract, and by virtue of said payment the title passed to him."

The judge concludes his findings as follows:

"I find, as questions of law, from the evidence and the contracts,—it being expressly provided in said contract that each party had the right to furnish an inspector to inspect and grade the lumber, and in case of disagreement of inspectors, a disinterested party should be called upon to settle any question of difference, and this lumber in question never having been measured and inspected according to provisions of the contract and usages of the parties under it,—that at time of levy under the said writs of attachment the title of the lumber in question had not vested in the plaintiff herein; that no title to the standing trees passed under said contract to plaintiff, the contract being for manufacturing rather than sale of standing timber; that by advancement of one-half of purchase price of lumber on estimated quantity and quality

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on yard under said contract did not of itself pass absolute title to the lumber in question to the plaintiff, and the title to the said lumber replevied at time of replevy was in George Murphy and William Farnsworth, and hence subject to levy under said writs of attachment."

The defendant had judgment accordingly.

In *Lingham v. Eggleston* 27 Mich. 324, it was decided that the question whether a sale is completed or only executory, is usually one to be determined from the intent of the parties as gathered from their contract, the situation of the thing sold, and the circumstances surrounding the sale; that where the goods sold are designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined; these being circumstances indicating intent, but not conclusive; but that where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of these things, in the absence of anything indicating a contrary intent, is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they appear to be in a state in which they may be and ought to be accepted. This case has been referred to with approval in the subsequent cases of *Hatch v. Fowler* 28 Mich. 205; *Hahn v. Fredericks* 30 Mich. 223; *Wilkinson v. Holiday* 33 Mich. 386; *Grant v. Merchants' etc. Bank* 35 Mich. 515; *Scotten v. Sutter* 37 Mich. 526; *Carpenter v. Graham* 42 Mich. 191; *Brewer v. Salt Association* 47 Mich. 526. The cases elsewhere to the same effect are numerous, and many of them are collected in Mr. Bennett's note to section 319 of the third edition of Benjamin on Sales. And see *Kelsea v. Haines* 41 N. H. 246; *Southwestern Freight Co. v. Stanard* 44 Mo. 71; *Shelton v. Franklin* 68 Ill. 333; *Straus v. Minzesheimer* 78 Ill. 492; *Crofoot v. Bennett* 2

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N. Y. 258; *Groat v. Gile* 51 N. Y. 431; *Burrows v. Whitaker* 71 N. Y. 291; *Dennis v. Alexander* 3 Penn. St. 50; *Galloway v. Week* 54 Wis. 608; *Caywood v. Timmons* 31 Kan. 394.

That the cases referred to settle the general principle, at least for this State, is beyond question or cavil. Presumptively, the title does not pass, even though the articles be designated, so long as anything remains to be done to determine the sum to be paid; but this is only a presumption, and is liable to be overcome by such facts and circumstances as indicate an intent in the parties to the contrary.

In this case the circuit judge has not passed upon the question of intent as one of fact, but he has found, as matter of law, that, under the contract, the title had not passed when the attachment was made. In thus treating the question as one of law instead of fact, we think he erred. The facts found by him might possibly have justified the conclusion as one of fact, that the minds of the parties had not met in an intent that the title should pass; but the opposite conclusion seems much the more reasonable, and it is hardly probable that the circuit judge would have failed to draw it, if he had felt at liberty, under the terms of the contract, to do so. But the justification would have been ample under the authorities. The lumber which was attached had been examined by the parties as lumber which the plaintiff was to receive; they had agreed in an estimate of the quantity, and the plaintiff had made the payment upon that estimate which, by the contract, he was to make upon inspection. The lumber was therefore set apart for the plaintiff by examination, estimate and payment; and it is not likely that either party supposed, after the payment had been made, that the ownership was in any one but the plaintiff.

That, for the purpose of determining with accuracy the sum to be finally paid, an inspection was to be had, is true. But this fact is not inconsistent with an intent that the title should pass immediately, when partial payment was made on the estimate. *Colwell v. Keystone Iron Co.* 36 Mich. 51; *Macomber v. Parker* 13 Pick. 175; *Williams v. Adams* 3

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Sneed 359; *Sewell v. Eaton* 6 Wis. 490; *Morrow v. Reed* 30 Wis. 81; *Ockington v. Richey* 41 N. H. 275; *Fitch v. Burk* 38 Vt. 683; *Hatch v. Oil Co.* 100 U. S. 124; *Oil Co. v. Van Etten* 107 U. S. 325. The title might pass even without delivery, if the property were sufficiently identified: *Kimberly v. Patchin* 19 N. Y. 338; *Russell v. Carrington* 42 N. Y. 118; *Watts v. Hendry* 13 Fla. 523; and even though something remain to be done to fit it for delivery. *Elgee Cotton Cases* 22 Wall. 180; *Butterworth v. McKinly* 11 Humph. 206; *Cummins v. Griggs* 2 Duv. 87; *Burr v. Williams* 23 Ark. 244. But the delivery made in this case was all that the contract contemplated, and was therefore sufficient. *Morrow v. Campbell* 30 Wis. 90; *Rattary v. Cook* 50 Ala. 352; *Hurd v. Cook* 75 N. Y. 454; *Bell v. Farrar* 41 Ill. 400; *Graff v. Fitch* 58 Ill. 373; *Gilman v. Hill* 36 N. H. 311. Cases closely resembling the one before us in the more important facts may be seen in *Fitch v. Burk* 38 Vt. 683; *Bush v. Barfield* 1 Cold. 92; *Boswell v. Green* 25 N. J. Law 390; *Burrows v. Whitaker* 71 N. Y. 291; and *Sedgwick v. Cottingham* 54 Iowa 512. Others are cited in the note to Benjamin on Sales, above referred to. The case differs from *Stephens v. Santee* 49 N. Y. 35, in which there was no acceptance.

A new trial will be ordered.

The other Justices concurred.

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ELBRIDGE G. STUDLEY AND ALVA B. RICHMOND v. JACOB BARTH.

Verbal guaranty of payment void under Statute of Frauds.

A verbal promise to a merchant to guarantee payment for anything a third person should want in equipping a saw-mill at which he was to manufacture shingles for the promisor, is within the Statute of Frauds, and cannot support an action by the merchant against the person making the promise.

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Error to the Superior Court of Grand Rapids. (Parrish, J.) April 29.—June 4.

ASSUMPSIT. Defendant brings error. Reversed.

Powers & Wolf for appellant. Non-existence of a debt does not make a promise to pay it when it exists, an original undertaking: Brandt on Suretyship § 61; Browne Stat. Frauds (3d. ed.) § 162; *Huntington v. Wellington* 12 Mich. 10; the test is whether the original debtor remains responsible or not: *Welch v. Marvin* 36 Mich. 59; *Bugbee v. Kendricken* 130 Mass. 437; but this is not always material if a new consideration moves between the newly contracting parties: *Mallory v. Gillett* 21 N. Y. 412; *Calkins v. Chandler* 36 Mich. 320; *Corkins v. Collins* 16 Mich. 428; provided the benefit to the promisor is the direct and not merely the incidental object of his promise: *Clapp v. Webb* 52 Wis. 638; *Furbish v. Goodnow* 98 Mass. 296; *Gower v. Stuart* 40 Mich. 747; but defendant's interest in the promise does not take it out of the scope of the Statute of Frauds: *Mallet v. Bateman* L. R. 1 C. P. 163; a promise to be responsible for whatever a third party might desire is a guaranty: *Smith v. Loomis* 72 Me. 51; *Kinloch v. Brown* 2 Speers 284.

Peter Doran for appellee.

SHERWOOD, J. Both parties in this case are merchants, and do business in the city of Grand Rapids. The plaintiffs in the spring of 1882 dealt in belting, and through their traveling agent took an order for goods from the firm of Houghton & Fuhrman, at Hersey, where they were operating a shingle-mill. This firm at Hersey had a contract with defendant to manufacture shingles for him at their mill, but had no authority to purchase goods on his credit. On receiving the order the plaintiffs' information as to Houghton & Fuhrman's responsibility was not favorable, and the plaintiff Richmond went to the defendant to talk with him about it, and the following is his narrative of the conversation had with defendant, as given on his direct examination:

"Immediately after receiving the order I went to see Mr. Barth in regard to it. I stated to him that we had received

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an order from Houghton & Fuhrman for belting and supplies for their new mill, and from all the information we could gain in regard to their responsibility from mercantile agencies, etc., we did'nt consider them worthy of credit, but understanding that they were going to do work for him we would require him, or some responsible party, to guaranty the account before we would ship the goods. He said he had no doubt but what we would get our pay, and for us to ship the goods and he would become responsible for the amount; that they were going to do sawing for him, and whatever they might desire for their mill he would guaranty to pay for it. On the strength of that conversation we shipped the bill of goods to them."

On his cross-examination the witness testified in substance that their agents took the order for the goods; that they charged the goods to Houghton & Fuhrman on their company books, and never charged anything to the defendant; that immediately on the receipt of the order he went to defendant and asked him about the responsibility of Houghton & Fuhrman; that he told witness they were going to work for him, and "that he would assume the order—that he would guaranty the payment of it;" that after the goods were delivered, the defendant told plaintiffs if they would get a note of Houghton & Fuhrman for the amount, he would indorse it; that they tried to get the note, but failed, Houghton & Fuhrman claiming the goods did not comply with the warranty plaintiffs made on the sale of them.

It further appears from the plaintiffs' testimony that the plaintiffs sent monthly statements of the goods sold and shipped to Houghton & Fuhrman, with request to pay, and that the goods were all sent to that firm and none to defendant, or any monthly statements to him; that plaintiff wrote them once for payment, besides the monthly requests, and sent them a note for the amount of the account, to sign.

This was the showing on the part of the plaintiffs, and it is presumed is as favorable to them as the circumstances of the case would admit. The defendant claimed that under this showing he was not liable; that the case came within the Statute of Frauds, inasmuch as it was a promise to answer for

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the debt of another and not in writing, and asked the court to so instruct the jury, at the close of the plaintiffs' case. The court, however, thought otherwise, and the defendant's counsel excepted. The trial proceeded, and the plaintiffs had judgment for $276.76.

We think the record shows the case clearly within the statute, and that the exception was well taken. The court should have instructed the jury as requested. The authorities cited by defendant's counsel fully sustain this view.

It is unnecessary for us to consider the other exceptions.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

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STEPHEN L. MONROE, SHERMAN A. BOYCE AND NELSON R. HOWLETT v. ANDREW GREENHOE.

Taxation of Lumber—Partnership.

1. Lumber that is brought to a railway station for transit merely, and is kept there in piles for convenience of shipment upon grounds that are neither owned nor hired for the purpose, is not taxable at that place as property in storage.

2. A man arranged with a firm that he would buy standing timber and cut, pile and ship it, being paid therefor its cost and a certain sum per thousand; the firm was to sell it, and after paying all expenses was to divide the net proceeds with him equally, and he was to bear half the losses. But he had nothing to do with disposing of it after shipment, and the firm had no control over it before. *Held*, that this arrangement did not amount to a partnership as to the unshipped lumber at least; and the parties concerned could not be taxed as a firm upon such lumber.

Error to Montcalm. (V. H. Smith, J.) April 29.—June 4.

REPLEVIN. Plaintiff brings error. Reversed.

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J. C. FitzGerald for appellant. It is the hiring of a place of storage that is made a ground for taxation; not merely occupancy: *Huckins v. Boston* 4 Cush. 543; *Loud v. Charlestown* 103 Mass. 278; *Campbell v. Machias* 33 Me. 419; *Desmond v. Machias Port* 48 Me. 478; *Lee v. Templeton* 6 Gray 579.

Morse, Wilson & Trowbridge and *Mitchel, Bell & McGarry* for appellee.

CAMPBELL, J. Plaintiffs, who are a firm of partners doing business in Spring Lake, Ottawa county, replevied from defendant certain lumber which he had seized in the town of Evergreen, Montcalm county, for taxes levied on this same lumber, and for similar taxes levied on certain other lumber, which he claimed plaintiffs were bound to pay.

The first tax was levied against plaintiffs by their partnership name upon a large pile of lumber, piled up near a mill owned by J. M. Weatherwax, and previously sawed by him for plaintiffs. This sawing was done under a contract by which Weatherwax was to remove the timber from certain lands described, and to saw and assort it as he should be directed, and cross-pile it on some siding of the Stanton branch of the Detroit, Lansing & Northern Railroad, in a convenient manner to be loaded on the cars, and such as should not be thus cross-piled he agreed to deliver on board of the cars, at his own expense. Plaintiffs did not own or hire the place where the lumber was piled, and did not keep any agent there who had any right to sell it, but made their sales at their office in Spring Lake, except in one or two instances, when special arrangements were made for disposal of small amounts.

So far as this lumber is concerned, we think it is covered by the decision in *Torrent v. Yager* 52 Mich. 506, made at the January term. The statute fixes the usual place of taxation, where, by the general principles of law, personal property is regarded as belonging at the place of residence of the owner, which in partnership cases is declared to be where its principal business is carried on. The exceptions to this, as

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explained in that decision, are where the owner or person having control "hires or occupies a store, mill, place for the sale of property, shop, office, mine, storage, manufactory, or warehouse therein, for use in connection with such goods and chattels."

The ground on which this taxation is claimed to be justified is that the plaintiffs owned or occupied a "storage." We do not think it is very important in this case to consider whether the manner of piling up this lumber has any bearing upon the question of storage. That was not the controversy made by the plaintiffs. What they insisted on was that under such an arrangement, which contemplated bringing and piling the lumber for purposes of convenient shipment, the lumber could in no proper sense be regarded as in a place of storage occupied by plaintiffs for use in connection with it.

We think the plaintiffs are right in their claim. It is no part of our legal policy, and the statutes do not favor the idea, that any municipality can properly lay burdens on property brought or placed there for transit. The exceptional taxation referred to is only authorized and justified as a charge on that which is used for purposes of local business, where the owner or some agent occupies premises for business purposes. Such an occupancy as the present does not differ in principle from the deposit of articles on the premises of carriers for carriage. And the fact that in the continued moving and removing process some of the lumber is not at once shipped in the order of its piling, can make no difference in determining the character of the transaction. The plaintiffs are taxable for the property where they reside, and it cannot be taxed elsewhere.

The other property was not taxed to plaintiffs, but to "Weatherwax, Monroe, Boyce & Co." Mr. Weatherwax paid half of the tax, and all of the highway tax, and defendant claimed to collect the rest of plaintiffs. There is no proof of the existence of any such partnership as Weatherwax, Monroe, Boyce & Co., and the testimony is undisputed to the contrary. If there had been, it is not very clear how

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Weatherwax could be authorized to be dealt with separately for a portion of the tax. But the defendant claims that there was what in law amounted to a partnership in the lumber in question, and that this partnership resided at Evergreen.

The arrangement between the parties was this: Mr. Weatherwax agreed to buy a tract of timber himself, cut and saw the lumber, pile it, and put it on board the cars, for all which he was to have the cost of the timber, and four dollars and a half per thousand besides. Monroe, Boyce & Co. were to sell the lumber, and have half of the proceeds after paying Weatherwax and such further expenses as might be incurred, he to have also one-half of such net proceeds, and bear half of the losses if any occurred.

We do not think this agreement made any partnership in the proper sense of the term, except, possibly, in such lumber as was actually loaded on the cars, and there are difficulties in the way of holding even that. After shipment, Weatherwax had no voice in disposing of the lumber. Before shipment, Monroe, Boyce & Co. had no control over it. If Weatherwax had not bought the timber, or having bought it had not sawed it, or having sawed it had made some other disposition of it, he would have violated his contract; but it would be difficult to say that the lumber belonged to any one else before shipment. And as the firm of Monroe, Boyce & Co. were to make all further disposition of the lumber so shipped, and were by the agreement to deal only with the lumber in that condition, we can see no reason which would justify us in saying that there was any such firm as that taxed, doing business at Evergreen, or any such firm having partnership powers anywhere. Monroe, Boyce & Co. could not, we think, be liable for these taxes.

The court should have ordered judgment for the plaintiffs, instead of for the defendant.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

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Robert Pound and Mary Pound v. The Port Huron & Southwestern Railway Company.

Railway fencing—Injuries to crops by cattle escaping from the right of way—Refusal of instructions—Exceptions.

1. A railway company's liability for an injury done to crops by cattle that have gone upon the premises in consequence of the company's neglect to fence its right of way, is not changed by the fact that the road was at the time in the hands of a contractor who had nothing to do with the fencing.
2. Requests to charge are properly refused if the judge, instead of giving the requests, fully and correctly instructs the jury as to the law applicable to the case.
3. An exception to refusals to charge is too general which states that "the court refused to give any of the foregoing requests, and the counsel for defendant in due time and form excepted to each refusal."
4. A railroad company is required to fence its right of way so that cattle can not come upon it. How. Stat. § 3377. *Held*, that where a company had acquired a right of way across a farm and had taken down the fences already on the premises, it was liable for injuries done to the crops by cattle which had come upon the right of way and had escaped therefrom upon the farm.

Error to St. Clair. (Stevens, J.) April 29.—June 4.

Case. Defendant brings error. Affirmed.

Avery Brothers for appellant.

Frank Whipple for appellees.

Sherwood, J. The plaintiff brought an action on the case for an injury done to his grain and crops in 1882 by cattle entering upon his premises by reason of the defendant's failure to fence its right of way, as required by statute. The plaintiff had judgment for one hundred dollars and defendant brings error.

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From the record, which is very full, it appears that the injury occurred while defendant was building the road. One J. S. Casement had the contract for grubbing, clearing and grading the track, and this is supposed by defendant to release it from whatever liability there may be to the plaintiff for the damage done him. This is a mistake. See 2 Thomp. Neg. 903–908. Casement's contract had nothing to do with building or maintaining fences along the right of way, and in no way affected the defendant's liability any more than the negligent action of any other of the employees of the company.

No exceptions were taken to the rulings in admitting the testimony. Seven requests were made by defendant's counsel for the court to charge, all of which were refused by the circuit judge, and in lieu thereof he charged the jury in his own language, and upon his own motion. This course is quite proper, and many times preferable, if the law applicable to the case is correctly and fully given. See *Campau v. Dubois* 39 Mich. 274.

The exception taken by defendant's counsel to the refusal to give his requests in the language stated by him is very general, and is hardly to be taken distributively under the former rulings of this Court. The language used is: "The court refused to give any of the foregoing requests, and the counsel for defendant in due time and form excepted to each refusal." *Browne v. Moore* 32 Mich. 254; *Polhemus v. Ann Arbor Savings Bank* 27 Mich. 44; *Niles v. Rhodes* 7 Mich. 374.

If, however, we give the defendant the full benefit of all his exceptions to the court's refusal to charge, we do not think his defense can prevail. How. Stat. § 3377 requires every railroad company to fence its right of way in such manner that cattle cannot get thereon. The evidence in this case shows that it was by getting upon the right of way and passing therefrom into the plaintiff's field that they were enabled to do the damage complained of. The right of way passed over the plaintiff's land.

It further appears that the premises where the property of

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plaintiff was injured was well and securely fenced, and sufficiently protected to secure the crops from injury and depredations by stock until the defendant entered upon the same and took down and away the fences, and thus left the fields exposed to the inroads of cattle coming upon and across its right of way. In doing this the company incurred the liability claimed by the plaintiff. The company, it is true, had secured the right of way over the plaintiff's land, but not the right to expose the plaintiff's grain and crops to destruction by neighbor's stock, or even by plaintiff's own cattle; and that, it seems, is what was done in this case.

We find nothing in the record to support defendant's first and second requests. They are clearly erroneous. There was nothing upon which to base defendant's third, fourth, sixth and seventh requests. The charge fully covers all that is contained in any of the requests necessary to be given to the jury.

We find no error in the charge or in the record, and

The judgment must be affirmed.

The other Justices concurred.

54	15
81	380
54	15
88	255
54	15
104	441

THE PEOPLE v. JOHN BROWN.

Perjury by an accused person testifying in his own behalf—Certiorari as to plea of guilty—Suspended sentence.

1. Where an information alleges that the respondent appeared as a witness "on his own behalf" no other statement that he had been allowed to testify "at his own request" (How. Stat. § 7544) is necessary.

2. False swearing in one's own defense, if it amounts to perjury, is not excused by the fact that it may have been made immaterial by other testimony whereby the witness had already convicted himself.

3. A circuit judge's return to a writ of certiorari issued to ascertain whether or not a plea of guilty was voluntary is conclusive as to the fact, of which the judge is required to satisfy himself by private examination.

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4. Where an affidavit for a certiorari to determine whether a plea of guilty was voluntary set forth that the prosecuting attorney had procured it by holding out hopes of leniency, the judge, in making return to the writ, properly attached the prosecuting attorney's affidavit that he had in no way approached the accused.

5. The pardoning power in Michigan belongs to the Governor alone; no judge can exercise it by indefinitely suspending the sentence of a convicted criminal. And the presentation to a judge of any petition for such suspension is a grave impropriety.

6. Judgment on a plea of guilty should be set aside if the plea was made in consequence of any intimation from the judge that the sentence would be more severe in case of conviction upon a trial. And it should be set aside, even if the intimation was not by way of threat, but the punishment was severe. It need not be, however, if the judge, in answer to importunities, has only shown a disposition to inflict a milder punishment on confession of guilt, and has done so. But no such intimation, however guarded, is proper.

7. A prisoner who lets his plea of guilty stand after a full examination by the judge as to whether it was voluntary, and a frank assurance from him that he must inflict some punishment by way of example, cannot complain that his plea was obtained by raising false hopes of leniency.

Error to Kalamazoo. (Mills, J.) April 29.—June 4.

PERJURY. Respondent brings error. Conviction affirmed.

Oscar T. Tuthill and *Powers & Oxenford* for appellant.

Attorney General *Van Riper* for the People.

COOLEY, C. J. Respondent, in the month of September, 1883, was arrested on a warrant issued by a justice of the peace of the county of Kalamazoo, which charged him with perjury, said to have been committed as a witness on his own behalf when being tried on a charge of unlawfully keeping open on Sunday a saloon of which he was proprietor. The justice examined a number of witnesses in support of the charge of perjury, and held the respondent for trial in the circuit court. An information, based on the charge before the justice, was then filed in the circuit court, in which, after setting out the proceedings before the justice on the charge of unlawfully keeping open the saloon on Sunday, it was

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averred that the said respondent "then and there appeared as a witness in his own behalf, under a plea of not guilty," and falsely, corruptly, knowingly, willfully and maliciously gave the following evidence, which was alleged to have been material to the issue, and all of which was false:

"On said Sunday, the said 16th day of September, as aforesaid, the said saloon was not open at all during the afternoon of said day, and no liquor was sold to any persons at any time during the said day, and no persons were in the said saloon during any portion of the said day, except the said John Brown, and his family and employees; and said saloon was not open at any time during the day except during a short time in the morning, while he was working with some hose in front of and in the fore part of the said saloon, and he saw no liquors sold by any of his employees during any portion of said day."

Being called upon to plead to the information December 15, 1883, the respondent pleaded in abatement "that he has not had a preliminary examination, nor waived the having of such examination, as provided by law for the offense charged in said information of perjury, when properly and sufficiently laid and assigned; and that he is not and never has been a fugitive from justice." This plea was replied to by the prosecution, and overruled, and the respondent then pleaded not guilty. Subsequently he withdrew this last plea and pleaded guilty, and on January 5, 1884, he was sentenced to confinement in the State prison for one year and six months.

Respondent, after being sentenced, sued out a writ of error, and he also applied for and obtained a writ of certiorari directed to the circuit judge. The affidavit on which this last writ was obtained, after setting out the filing of the information, and the plea of not guilty thereto, after decision on the plea in abatement, proceeds as follows:

"That thereafter, as well as before, and from the 10th day of December last, he was often approached by said Knappen, the prosecuting attorney, who talked to deponent about his case, advising him to change his plea of not guilty, saying to him, deponent, that he would get a lighter sentence thereby, if any at all, and that if he plead guilty he would use

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his influence, and help him all he could with the judge to have the sentence in his, deponent's, case suspended.

"Deponent says that like talks occurred by said prosecuting attorney with him in the village of Kalamazoo at different times and places therein, subsequent to said first day of the term, together with other persons, residents of said village, and interested in behalf of deponent, till he, deponent, was led to believe, against the advice of his counsel in said case, that a plea of guilty to the information as filed against him would secure his liberty under a suspended sentence, which would be the best thing to do rather than stand trial, and that being so impressed and influenced by said prosecuting attorney, and those who claimed to know what the judge was disposed to do in case he changed his plea to guilty, viz., that he would suspend sentence, deponent did so change his plea of not guilty to that of guilty, on the 2d day of January, 1884. Whereupon he was immediately remanded to jail, and there kept till Saturday, the 5th day of January, inst., when he was brought out before the court for sentence; that just previous thereto, and at no other time, Alfred J. Mills, the circuit judge, had a few moments talk with him in the back room of the court-house, which commenced by the said judge asking deponent why he plead guilty. Whereupon deponent told him he did it because he had been advised and influenced to do it by his friends outside, in the hope of having sentence thereon suspended; that he did not intentionally or knowingly do wrong, and ought not to be imprisoned, and did not expect to be, and that he had been influenced to believe that the court would suspend sentence in his case and give him his liberty thereunder if he plead guilty to the charge, and therefore he had done it, expecting that to be the result, saying also in the same connection that he would rather die in his cell in jail that day than go to State prison for any time, and that he did not expect he would send him to State prison; that there the talk ended, and the judge told him to go out in the court-room, and the single question being put to him by the court, if he had anything to say why sentence should not be pronounced, the said court proceeded to sentence him, deponent, to the State prison at Jackson, at hard labor, for the period of one year and six months from and including said day.

"And deponent says he never plead guilty to the charge against him in said case freely and without undue influence, but, on the contrary, was unduly influenced to do as he did in pleading guilty, with the hope, understanding and prom-

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ise that he would not be sentenced to State prison if he did, but that sentence would be suspended; and that, in the single and only interview he had with the judge, he told him the circumstances under which he plead guilty, and the hope of favor and the influence that induced him to so plead.

"And deponent alleges that he is advised and believes that the proceedings by the judge of said court to make the investigation necessary and as required by him respecting the case, the circumstances of the plea of guilty to the charge, and his sentence and judgment, was erroneous, irregular, not in accordance with the statute, and void, and should be set aside and quashed, for the following reasons, to wit: 1st. The said circuit judge did not perform his duty under Act 99 of Laws of 1875, of this State, as required therein, before pronouncing judgment and sentence in said case. 2d. The judge of said circuit court did not properly perform his duty under the statute of this State, viz., Act 99 of Session Laws, 1875, after the investigation made by him as to the plea of guilty in this case, and the circumstances there made known to him under which it was made, and that the sentence and judgment thereafter pronounced are void. 3d. The judge of said circuit court did not become satisfied, from any investigation and interview with deponent before pronouncing sentence and judgment, that his plea of guilty was made freely and without undue influence, and therefore such sentence and judgment are void. 4th. The said judge of said circuit court, in the investigation and interview had by him in the performance of his duty under the statute of this State in this case, viz., Act 99 of Session Laws of 1875, before pronouncing sentence and judgment in this case, was informed and distinctly told that the plea of guilty in this case was by reason of influence, and not freely, without promise or hope of favor, but with the understanding and belief that sentence would be suspended."

The circuit judge made return to the writ of certiorari, the material portions of which are as follows:

"In obedience to the writ of certiorari hereto attached, I, the undersigned, circuit judge, by whom said respondent was sentenced, do hereby certify and return that, as to the matters stated and set forth in the affidavit upon which said certiorari was allowed, with reference to what took place between said respondent and the prosecuting attorney of Kalamazoo county, I have no personal knowledge, but believe the same

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to be wholly untrue, and base such belief, in part, upon the affidavit of Frank E. Knappen, hereto annexed and made a part of this return.

"And I further return that on the 10th day of December, 1883, the respondent was arraigned upon an information charging him with perjury, and that he plead thereto not guilty; that thereupon Oscar T. Tuthill, who claimed to be acting as his attorney, asked that such plea be allowed to stand, as entered pro forma, which request was granted. And I further return that, on December 15th, the respondent caused a plea in abatement to be filed to said information; that replication was thereafter filed upon the part of the People, and after hearing counsel for respondent and the prosecuting attorney, upon full consideration, the plea was overruled on December 20, 1883.

"And I further return that, on the 20th of December, I was approached by Oscar T. Tuthill, the attorney for the respondent, who inquired of me whether, in the event that the respondent plead guilty to the charge, I should be willing to suspend sentence; that I at once informed him that I would do nothing of the kind, and that it was not my habit or practice to announce, in criminal cases, what the sentence of the court would be in advance.

"And I further return that thereafter I was approached by one D. B. Merrill, Esq., in behalf of the respondent, and asked by him, in the presence of the prosecuting attorney, if, in the event that the respondent plead guilty, I would be willing to suspend sentence in his case; that I informed him, said Merrill, that I should do nothing of the kind, and that it would be time enough for me to determine what the sentence should be after the respondent was convicted.

"And I further certify that the respondent, upon the overruling of his plea in abatement, was required to plead anew; that, immediately before pleading, I was again approached in his behalf by his attorney, and I again informed him that, in the event that he plead guilty, I should not feel it my duty to suspend sentence; that he then announced to me that the respondent would plead guilty. The respondent, however, plead not guilty. And I further return that his case was then placed upon the call-board for trial in its regular order, and that, in fact, it had been upon call prior to that time.

"And I further return that, on the 1st day of January, I was again approached by the respondent's attorney, and again requested to suspend sentence in his case, provided the respondent plead guilty; that I again plainly stated that I should

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feel it my duty to do nothing of the kind, but that, if the respondent should plead guilty, I should view his case as one meriting less punishment than I should feel disposed to impose should he be convicted after a trial by jury.

"And I further return that, on the 2d day of January, the respondent's case was reached in its order upon call for trial, and the clerk ordered to call a jury therein; that then the attorney for the respondent announced that respondent desired to change his plea of not guilty to that of guilty. I inquired of the respondent if that was his desire, and he announced that it was, and the plea of guilty was accordingly entered. I then announced that nothing would be done in the case until after the holidays, and informed counsel that I should be glad to hear, at the time to which court would be adjourned, as to the antecedents of the respondent. And I further certify and return that the respondent was then remanded to jail, and court adjourned until the 5th day of January.

"And I further certify and return that, between the said 2d and 5th days of January, I was again approached by persons claiming to be friends of the respondent, in his behalf, and asked to suspend sentence in his case, and that I again informed such persons that it would not be my duty to do so, but that I would examine into the previous history of the respondent and consider any mitigating circumstances that there might be in his case, and that I was not prepared to announce in advance what his sentence would be; that in the afternoon of the 5th of January I caused the respondent to be brought to a private room adjoining the court-room, for the purpose of satisfying myself as to whether the plea of guilty entered by him was voluntary, and understandingly made.

"And I further return that I did not commence conversation with the respondent by asking him why he had plead guilty, nor did respondent tell me that he did so because he had been advised and influenced to do it by his friends outside, in the hopes of having sentence suspended, nor that he did not voluntarily or knowingly do wrong, and ought not to be punished, and did not expect to be; nor that he had been influenced to believe that the court would suspend sentence in his case, and give him his liberty thereunder, if he plead guilty to the charge; nor that he had plead guilty expecting that to be the result; nor did he say in that connection, or at any other time during the interview, or at all, that he would rather die in his cell in jail that day than go to the

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State's prison for any time, nor that he did not expect to be sent to the State's prison. In short, I return that no such interview took place between the respondent and myself as is set forth in his affidavit upon which said writ of certiorari was allowed.

"And I return further that upon respondent's being brought into said private room I told him to sit down, that I was then engaged, and that after a little I wanted to talk with him; that I commenced the conversation substantially as follows:

'Mr. Brown, you have plead guilty to an information charging you with perjury, and I want to find out whether your plea is voluntary or not. Did you plead guilty because you felt that you were guilty of the offense with which you were charged, or did you plead guilty because of any promises or influences brought to bear upon you to do so?'

"That the respondent in reply stated in substance that he plead guilty because he felt that he was guilty, and that he should have done so before had it not been that he was advised by his counsel not to do so; that he had thought the whole matter over, and he felt satisfied that that was the best thing for him to do; that he knew that he swore falsely in the justice's court upon his trial there, and that the People were able to show that he did, and that he felt very badly about the matter, and wanted to know the worst and have it all over; that when he was sworn in justice's court he did not realize that it was so serious a matter as he had found it out to be; that he was very sorry for what he had done, and that in future he would abstain from such conduct, and that when it was all over with he would quit the business that he was in and leave the country. I then asked respondent if, at the time he was sworn in the court below, he did not call to mind the case of the People against Frank Cobb, and the fact that a witness who was sworn upon that trial was afterwards sent to the penitentiary for four years for perjury committed by him thereon. He said that he remembered the case and knew of the fact, but that he did not think of it at that time. I then asked him how he came to have his bar-tender called as a witness upon his trial to swear falsely in his behalf, and he said he did not know how he came to do it, but that he was very sorry that he did do it. I then told him that several of his friends had approached me, and had requested that I should suspend sentence in his case, but that I had not given them any reason to expect that I would do so; that I was glad to find that up to the time

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that he left the employ of Mr. McCourtie and went into a saloon that his character had been good; that that would be taken into consideration and would lessen his punishment; that it would have been better to have taken Mr. McCourtie's advice not to go into such a business; that I trusted that after he had undergone the punishment which would be imposed upon him he would in the future refrain from the commission of crime of any kind, which he assured me he would do. He then stated that he thought the punishment that he had already undergone had been very severe; that he had a wife and some children who needed his assistance, and that he hoped that I would be as lenient with him as possible; that he had never been in jail before, and that if I would not send him to the penitentiary he would immediately quit the business he was in and leave the State. I told him I was very sorry for him and for his family, and that while, in view of all the circumstances, the punishment which he would receive would be light, I should feel it my duty to impose such a punishment as would serve as a lesson to him and to others who might be tempted to give false testimony in a court of justice.

"And I further return that during the interview the respondent seemed very penitent, and cried during most of the time.

"And I further return that I am unable to detail further what took place at the interview, but certify that the foregoing is the substance thereof, and that I became satisfied then, and am now satisfied, that the plea of guilty interposed by the respondent was entirely voluntary and made understandingly, and that he was fully aware of the nature of the offense imputed to him, and of the extent of the punishment which might be imposed upon one guilty thereof.

"And I further return that after the interview I told the respondent to take a seat in the court-room, and that as soon as court was in session I told the respondent to stand up, and then asked his counsel if he desired to be heard in the matter."

The judge then proceeds to give the speech of counsel in behalf of his client, in the course of which counsel presented a petition, said to be signed by thirty-five "prominent citizens," requesting a suspension of sentence. Counsel said: "It has not been sought by the circulator of this petition, I am informed, to increase the names to a large number, which

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he could easily have obtained, but only to show your honor what seems to be the sentiment of the entire community." No suggestion was made by counsel that the plea of respondent was not entirely voluntary. The judge then sets forth at length his own address to the respondent, in the course of which he referred to the petition which had been presented, and assigned reasons for not complying with it. The judge's return concludes as follows:

"And I further certify that, upon investigation of the respondent's antecedents and previous history, I found that prior to the time that he engaged in the business of selling liquor he had been a reputable citizen, but that the place which he had for some time been keeping was known as 'The Kitchen,' and as one of the lowest places in Kalamazoo —a resort for prostitutes and thieves; that he was arrested in the summer for violation of the liquor law by keeping his saloon open on Sunday; that he was tried therefor, and, with his bar-keeper, was sworn upon that trial, and afterwards charged with the commission of perjury, to which he plead guilty; that after he had been convicted of such violation of the liquor law, and was awaiting trial for the offense of perjury, he again kept open his saloon on Sunday, and sold liquor to a common drunkard, for which offense he was also arrested, and plead guilty and was fined. In view of all this, as well as in view of the enormity of the offense with which he was charged, I did not feel it my duty to suspend sentence in his case, but imposed the lightest sentence which, under the circumstances, I could consistently do.

"And I further return that I communicated to no person, before passing sentence upon said Brown, what sentence I should impose, and that I was not approached by the prosecuting attorney in behalf of said Brown, and intimated to no one what the sentence would be."

The affidavit of the prosecuting attorney, referred to in the return, states that "he has read a copy of an affidavit filed in the Supreme Court, made by one John Brown, to obtain a writ of certiorari, and in answer thereto states that he never approached said Brown to talk with him about his case, nor advise said Brown to change his plea of not guilty to guilty, saying to said Brown that he would get a lighter sentence, if any at all, or words to that effect, or that he

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would use his influence to have the circuit judge suspend sentence in his case. And deponent further says that he never told said Brown that if he pleaded guilty he would use his influence, and help him all he could with the judge, to have the sentence in his case suspended, or to get him a lighter sentence, or no sentence at all."

The foregoing sufficiently presents the record upon which a reversal of the judgment was demanded in this Court.

I. The information is said to be fatally defective. Several defects are pointed out, one of which is that the information does not affirmatively show that the respondent became a witness at his own request. This is supposed to be necessary under the statute, How. Stat. § 7544, which provides that "a defendant in any criminal case or proceeding shall only *at his own request* be deemed a competent witness," etc. The information alleges that the respondent appeared as a witness "on his own behalf;" and he must, therefore, have appeared voluntarily, and expressly or by implication have requested to be sworn. There is nothing in the point. Another supposed defect is in respect to the materiality of the false statements. It is said the information itself shows they were not material, because it shows that the defendant himself testified to the saloon being open on the morning of Sunday, and thereby admitted his guilt: *People v. Waldvogel* 49 Mich. 337; so that all he swore to about the place not being open in the afternoon, and liquor not being sold there during the day, was wholly immaterial. It may be, as counsel contend, that the respondent testified to that which should have insured his conviction; but it is not said, nor are we prepared to believe, that when he was giving his evidence he supposed he was admitting his guilt. On the contrary, it is very manifest that he intended to make his evidence sufficiently strong to disprove all criminal intent, and that he expected the jury to excuse the casual opening of the door in the morning, when he showed that throughout the day there had been no sale of intoxicating drinks. But it is immaterial now what he expected, or what views he or his counsel may have urged before the jury; it is enough for the

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purposes of this case that the false evidence bore directly upon the issue, and was in flat contradiction of much of the evidence put in by the prosecution, upon which a conviction was sought.

Some still more technical objections to the information do not appear to us sufficiently plausible to require attention.

II. The principal ground relied upon by the respondent for a reversal is that he did not voluntarily plead guilty. The evidence of this must be found in the return of the judge to the writ of certiorari. We cannot have any other. The judge, under the statute, is to satisfy himself by private examination on that subject, and if satisfied is to proceed to judgment. How. Stat. § 9558; *Edwards v. People* 39 Mich. 760; *Henning v. People* 40 Mich. 733; *Clark v. People* 41 Mich. 308; *People v. Ferguson* 48 Mich. 41; *People v. Stickney* 50 Mich. 99. It is said that much of the judge's return is surplusage, and that the affidavit of the prosecuting attorney was no proper part of it; but, under the circumstances, we do not think the judge is to be criticised for the manner or matter of his return. The affidavit for a certiorari was a serious impeachment of both the judge and the prosecuting officer; and while what was said of the latter officer could have had no legal bearing upon an inquiry which concerned no other question than whether the judge had properly satisfied himself that the plea of the respondent was voluntary, it was still not improper that he should put upon record the explicit denial of the prosecuting attorney that he had been guilty of the misconduct imputed to him. And it was certainly entirely proper for the judge to meet as fully as he has done the charge that he had failed in the performance of his own duty.

The only question now to be passed upon is whether it appears from the judge's return that he failed to perform his duty in his inquiry into the circumstances preceding and attending the plea of guilty. Counsel contend that it sufficiently appears that the plea was not voluntary, and they recapitulate the preceding facts as proof that this must have been the case. Among other things, we are told "that a

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strong public sentiment had been raised in favor of a suspended sentence in this case, as shown by the remarkable petition presented to the court in his behalf, signed by thirty-five of the most prominent citizens of the city of Kalamazoo. Such an effort made in behalf of this man could not have any other effect upon his mind than that which is alleged in his affidavit." It may be well to pause for a moment upon this petition. Coming from such a source it must certainly merit some attention.

How the public sentiment was "raised" which induced this petition we are not informed; but it will probably be safe to assume that any effort there may have been in that direction was not put forth by the prosecution. That the petition was "remarkable" is made plain enough by several facts. It is certainly remarkable that respectable members of any community should desire and request that a person who had committed two serious crimes to hide one petty one should be turned loose without punishment, among them; and the wonder increases when we perceive that, in order to preserve him for society, they formally request the judge himself, a high state official, and the chief conservator of law and public order in that part of the State, to grasp at power not confided to him, and usurp authority in the interest of a doubly convicted offender. That there may be no misapprehension on this point, it is only necessary to understand exactly what it was the judge was requested to do. In terms it was to suspend sentence. Now it is no doubt competent for a criminal court, after conviction, to stay for a time its sentence; and many good reasons may be suggested for doing so; such as to give opportunity for a motion for a new trial or in arrest, or to enable the judge to better satisfy his own mind what the punishment ought to be: *Commonwealth v. Dowdican's Bail* 115 Mass. 133; but it was not a suspension of judgment of this sort that was requested or desired in this case; it was not a mere postponement; it was not delay for any purpose of better advising the judicial mind what ought to be done; but it was an entire and absolute remission of all penalty and the excusing of all guilt. In other words,

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what was requested of the judge was that he should take advantage of the fact that he alone was empowered to pass sentence, and by postponing indefinitely the performance of this duty indirectly but to complete effect grant to the respondent a pardon for his crime.

Now it cannot for a moment be supposed that any thirty-five intelligent citizens of this State are ignorant of the fact that the power to pardon is an executive power, expressly vested by the Constitution of the State in the Governor and exclusively belonging to his office. And knowing that fact, as these petitioners must have done, they could scarcely fail to understand that this judge would be usurping the functions of the executive were he to assume to give total immunity from punishment. No doubt judges have done this sometimes, under the pressure of such influence as appears here; but this is no reason for asking a repetition of the wrong: it is rather a reason for being specially careful and particular not to invite it, lest by and by it come to be understood that the power to pardon, instead of being limited to one tribunal, is confided to many, and that the pressure of influence and respectability may be as properly employed with a judge to prevent sentence, as many seem to think it may be with a Governor to procure a formal pardon. The presentation of the petition was therefore a very great impropriety; and the judge treated it with a consideration, which, though it may have been called for by the prominence of the signers, was certainly not due to its prayer or purpose.

Probably the success of the effort to get names in the respondent's behalf did not impress the circuit judge very much, or convince him of the reality of any very strong desire on the part of the community to retain association with the respondent and have the benefits of his presence in the community. The intimation of the respondent to the judge that if pardoned he would leave the country it may well be supposed had been given to others also, and possibly names were given to the petition on an expressed or implied understanding that the respondent, if pardoned, should depart to some other state. But however that may be, the judge is

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to be commended for refusing to recognize it as a ground of pardon that the offender consents to make some other community the field of his future activity. And whatever hopes the petition had raised in the mind of the respondent, were hopes which were in no respect attributable to the judge; he did not invite the petition; it was gotten up in the interest if not by the procurement of the respondent; and it is made entirely clear by the judge's return that he never gave any person reason to believe he would suspend judgment because of the petition or for any other reason. The most that can be fairly imputed to the judge is an excess of patience in listening to the importunities. It was a natural consequence that he should on one occasion have been imprudent enough to intimate a purpose to impose a lighter sentence in case of conviction on plea of guilty than upon conviction by a jury. The importunities drew out from him that much; and it may be assumed that it possibly had some effect upon respondent's mind.

Had an intimation of the sort been made by way of threat, and a plea of guilty been secured thereby, the judgment upon the plea ought to be set aside. *O'Hara v. People* 41 Mich. 623. And even though not given by way of threat, had a sentence of great severity followed, it might have been apparent that the defendant had been wronged. But in this case, what was said was evidently only by way of partial concession to the respondent's friends who were pressing for a suspension of sentence. The judge gave all parties to understand that they could have no assurance of a compliance with their own request; but he intimated a willingness to be lenient in punishment. This intimation he acted on,—imposing a punishment which was only one-tenth of the maximum punishment allowed by law. In view of all the facts, as the judge understood them, the punishment was a very light one. Moreover, it is to be noted that, after this single inadvertent remark by the judge, he had a full and apparently very free talk with the respondent, in which he gave him distinctly to understand that, upon the plea of guilty, he should inflict punishment by way of example; and the respondent, after

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this conversation, had no excuse for an understanding or expectation that he would be let off on suspended sentence, or on a merely nominal punishment. Having suffered his plea of guilty to stand after that interview, he has no ground for complaint now. The judge is not chargeable with having raised hopes and then disappointed them, or with having in any manner misled him. The respondent had treatment at his hands more deserving of thanks than of complaint; and when we consider the statements made in the affidavit for a certiorari, and how completely these are met by the return and by the affidavit of the prosecuting attorney, it is greatly to be feared that the willingness to prevaricate under oath, when it seemed probable that something might be gained by it, was not wholly eradicated by the punishment inflicted.

The conviction is affirmed.

The other Justices concurred.

LOUIS L. KELLY v. OBADIAH A. KELLY.

Equity—Foundation for relief — Subrogation — Equitable lien — Statute of Frauds.

1. Complainant must abide by the case made by his bill. Neither unproved allegations, nor proof of matters not alleged, can be made a basis for equitable relief.

2. The doctrines of subrogation and of equitable lien are to prevent fraud and do justice, and should never be applied where subrogation would work injustice, or the establishment of an equitable lien would not be carrying out the intent of the parties.

3. An equitable lien upon real estate requires (1) a written contract, identifying the property as security for the debt; or (2) such relations between the parties as will make it right and just to declare the lien,—as, for example, in the case of a joint owner or bona fide purchaser making improvements in good faith, or in the case of partners' liens.

4. A verbal agreement between a son and his father that if the son will pay the father's debts, and obtain the discharge of mortgages upon

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his property, the father shall convey to him his real estate, is void under the Statute of Frauds, and can support no rights, either legal or equitable. If the son pays money under such a contract he can, perhaps, recover it back in assumpsit; but the payment will not create an equitable lien upon the real estate in his favor, unless rights inherent in the transaction have sprung up to support it.

5. Payment of incumbrances under an explicit verbal agreement that the incumbered property shall be conveyed to the person paying them, may be ground for subrogating him to the rights of the incumbrancers to the extent of the payment, but subject to such rights as may have arisen meanwhile.

6. The mere expectation of an inheritance cannot constitute any such consideration for the payment of incumbrances thereon, that the fear of having this expectation disappointed by the possible advent of other heirs can be made a ground for subrogation to the liens discharged.

Appeal from Washtenaw. (Joslyn, J.) April 29.—June 4.

BILL to establish lien. Defendant appeals. Reversed.

E. D. Kinne for complainant.

Noah W. Cheever and *Sawyer & Knowlton* for appellant.

CHAMPLIN, J. The bill of complaint states that on the 31st day of December, 1877, and for a long time prior thereto, defendant was the owner of three several parcels of land, particularly described in the bill, of the aggregate value of three thousand dollars; that he was deeply involved financially, and the lands incumbered by mortgages, one of two hundred dollars, one of three, and one of five hundred dollars, all held by Luther James of Ann Arbor, Michigan, which covered two of the parcels of land, and the other parcel was subject to a mortgage of one hundred dollars, held and owned by a Mrs. Smith. One parcel of the land has a dwelling thereon, and is situated in the city of Ann Arbor, and the other parcels lie just outside the corporate limits of the city. That he was owing unsecured debts, as follows: To Gilbert E. Johnson, $1000; Mr. Antler, $115; Ann Arbor Savings Bank, $50; and to complainant, $100. That he was somewhat advanced in years and broken in health,

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and was unable to pay these debts. "That on the 31st day of December, 1877, as aforesaid, the said defendant made an oral agreement with your orator, wherein and whereby it was agreed, understood and contracted that your orator should assume and pay off all the then existing indebtedness, of whatsoever name or nature, which was, or then might be, existing and outstanding against the defendant, including the incumbrances upon the aforesaid lands, and that, in consideration therefor, the aforesaid lands should then become, and thereafter be, the property of your orator. And it was agreed and understood that whatever was necessary to be done in the way of legal transfers to effect the arrangement would be done at the seasonable time."

The bill then alleges: "That in consideration of the assumption and payment of said indebtedness by your orator, the said lands should become, and did then and there become, the absolute property of your orator, with the right and power either to sell and convey said lands, and therefrom liquidate the aforesaid indebtedness, or to retain said lands as his own, and pay the said indebtedness, or to make such other or different disposition of said lands as to your orator might seem proper; provided your orator assumed and paid all of the aforesaid debts and incumbrances."

He then states that he at once entered upon the performance of his contract obligations, and then and there assumed the payment of the indebtedness to Gilbert E. Johnson "by executing his own note, *signed* by *the defendant*, and delivering the same to said Johnson," which he paid on August 21, 1880, amounting, with interest thereon, to $1189; that in the month of October, 1877, prior to said agreement, he paid, at defendant's request, interest upon the James mortgage, amounting to $110, and in October, 1878, he paid to Luther James interest amounting to $120. In May, 1879, he paid upon the James mortgage $300, and in March, 1880, he paid the balance due to Luther James of $371.86, and thereupon the five hundred dollar mortgage was discharged; that in November, 1879, he paid the principal and interest due on the Smith mortgage, amounting to $118.50, and

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caused the same to be discharged; that in the summer of 1879 he paid to Mrs. Antler the amount of defendant's note held by her, of $115, and another note to the Ann Arbor Savings Bank, of $50; that he has fully performed his part of the agreement, and liquidated the entire indebtedness against defendant, except the payment of the mortgages, amounting to five hundred dollars, held by Luther James; that he is ready and anxious to pay said mortgages, *and would have done so long before*, had he not felt apprehensive of the conduct of the defendant, "lest he should be jeopardized in the security in the sums of money already advanced, and any sum thereafter advanced."

It is stated in the bill that defendant continued to reside on these lands until about the first of January, 1879, when he came to live with complainant at Farwell, Clare county, Michigan, and so continued to live at Farwell until about May 1, 1880; that in February, 1879, defendant's wife died at Farwell.

The complainant proceeds to state the conduct of the defendant which caused him to feel apprehension lest he might be jeoparded in his security, as follows: "That defendant, some four months since, intermarried with a young woman of some twenty-three years of age, and from the time of such marriage has lived apart from your orator; that since his marriage he has manifested a different spirit toward your orator, and has sought to repudiate the agreement made between them as hereinbefore set forth; that your orator, becoming alarmed lest his moneys as aforesaid advanced might be endangered or lost, and discovering a disposition on the part of the defendant to ignore said agreement, your orator asked and urged the said defendant to complete the arrangement and understanding so as aforesaid entered into between them, and to that end to execute a deed of conveyance of said lands to your orator in pursuance of such contract and understanding, but the said defendant has and does utterly refuse so to do; that your orator, finding that the defendant was unwilling to convey the said premises to your orator, urged him to deliver to your orator a mortgage upon the

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lands as security for the money so advanced by your orator to the defendant as hereinbefore set forth, or in some other manner to secure your orator the said sums of money so advanced, but the said defendant refused so to do, or to make any arrangement whatever with your orator for repayment, security or conveyance, and on the other hand occupies a hostile attitude toward your orator."

The relief prayed for is, 1st. That defendant be required and compelled to make, execute, and deliver to complainant a good and sufficient deed of conveyance of said lands; or 2d. That complainant's title and estate therein may be adjudged and decreed to be perfect and complete as of the 31st day of December, A. D. 1877; or 3d. That he be compelled to deliver to your orator ample and satisfactory security for the prompt repayment of the said sums of money as aforesaid advanced; or 4th. That complainant be decreed to have an equitable mortgage upon the said premises for the moneys advanced, and a sale thereof for the sums to be decreed; and a prayer for general relief.

Defendant answered under oath, denying the agreement set up in the bill, and giving a family history at length. Proofs were taken, and the court below entered a decree which is entirely silent as to the existence of the agreement set forth in the bill, but asserts that, it appearing to the satisfaction of the court that complainant has advanced and paid, at the request of defendant, $931.32, upon three certain mortgages named in the bill, covering the two parcels first described therein, and the further sum of $118.50 on the second parcel; and that complainant is justly and equitably entitled to be subrogated to the rights of the mortgagees for all payments by him made upon said mortgages, and to a lien upon said lands for the payments so advanced; and decreeing that the respective sums be just, legal and valid liens upon the lands which had been incumbered by the mortgages paid, and that in default of payment by defendant by a certain day therein named, the lands be sold by a circuit court commissioner, and the moneys applied to payment of complainant, and the surplus, if any, be brought into court to abide its further

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order. It was further decreed that the lien established upon the premises by the decree should stand and have priority over all liens and incumbrances except those existing on the 31st day of December, 1877. From this decree defendant appealed; and, as complainant has not appealed, he is presumed to be satisfied with the decree entered below; and the only question for our consideration is whether the decree pronounced ought to stand.

The proofs in the case are quite voluminous. The parties are son and father respectively. The father was a man of limited means. He had formerly lived in Vermont, where he carried on a photographer's business, and many years ago had removed to Ann Arbor, where he engaged successively in the photograph, grocery, milk and concrete sidewalk business. His family consisted of his wife and three sons, of whom complainant was the youngest. He had educated the two eldest sons at the University, which took about all he could earn at the time. Both of these sons are dead. The complainant attended the Union school until he was about fifteen years of age; then assisted his father until he was twenty-one. At nineteen he attended the Normal School and prepared himself for teaching. Soon after he was twenty-one he married and brought his wife to his father's, where they resided in the family. It seems to have been the desire of the father to give to this son a university education, and he proposed that he should take a regular literary course, but the son objected, saying it would take him six years to work through; but if it could be arranged so that himself and wife could be supported in the mean time, he would like to go through the Medical Department of the University. The father was in straitened circumstances and in debt. The mortgage incumbrances set up in the bill were then existing, and he owed one Gilbert E. Johnson, a nephew, nearly $1000 for money he had borrowed to send his other sons through school.

The father testifies that at this time it was arranged between him and his son that he and his wife should live with him, and he would support them and aid the son to pass through the Medical Department and to start in business, and after he

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should get established in business and was able to do so he should assist him, the father, in the payment of his debts. This was in 1872, and the son was then twenty-two years of age. He entered the Medical Department of the University, and graduated in the spring of 1875. The father assisted him during the time, and during the vacations he assisted his father. Their relations appear to have been of the most friendly character, and mutually satisfactory. After graduating he located at Farwell, Clare county, where he soon established a good business. The father continued to aid him in various ways, sending him fruit, vegetables, butter, etc., and he in turn assisted his father by sending him money, and in October, 1877, he paid interest upon the mortgage incumbrances to the amount of $110. In December, 1877, the parents made a visit to their son at Farwell, and it was during this visit that the complainant claims the agreement was made which he sets up in the bill of complaint. The immediate occasion, as he claims, of this agreement being made at that time was a visit from Gilbert E. Johnson, above referred to, who says he was well acquainted with the financial condition of defendant, and had often been consulted by him in reference to his business affairs. He had left his residence in Vermont and gone to Ann Arbor, expecting to find defendant there, to make some arrangement about the payment of such indebtedness. He followed him to Farwell. There he learned that the son was well established in business, with a good prospect before him, and he was not slow in coming to the conclusion that a note signed by the father and the son would place him in a position where he could reasonably expect the indebtedness to him would be paid in a short time. He says he preferred such a note to security upon defendant's real estate, incumbered as it was.

Johnson is the main witness by whom complainant seeks to establish the contract set forth in the bill. He claims to have been present at the time it was made. He says it was on the last day of December, 1877, and grew out of his asking defendant for pay or security upon his note. He is not willing to admit that he requested a note signed by the father

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and son, but says he talked it up with defendant, and that the father said that he did not know whether his son would sign with him, but would ask him. Johnson told the defendant if the son Louis would sign with him, he would reduce the note from ten to seven per cent., and they might let it run until it was convenient to pay it. Later in the evening of the same day he says the agreement was made, concerning which he testified as follows:

"*Question.* Was it at that time, if at all, that an arrangement was made between Louis and his father in reference to the property and the payment of the defendant's debts?

Answer. Yes; there was a general discussion of this whole matter during half an hour; perhaps more. It was finally arranged that Louis should sign this note and his father should transfer the property to him.

Q. Were you present at that time?

A. I was.

Q. Who was present?

A. Obadiah, the son, and myself.

Q. What was the agreement as you heard it between the father and son?

A. The father proposed to let him have the entire property. They talked about all this indebtedness; he had talked with me about it before. That was a matter I was interested in. Of course, if I took this mortgage I had to take all these other mortgages that was taken. There was a discussion of the whole matter,—the amount, etc.,—and finally he said if Louis would assume this indebtedness and pay it,—that Louis was in shape to pay it, or would be,—he could not say but Louis would be able to raise it while I was there. Before this he had said that Louis wanted to keep the home place, and he presumed Louis would step in and do something for that reason, and he proposed to let Louis do as he pleased with it. Louis then said he would like to keep it—the homestead—if he could. Perhaps they would want to come back here, and perhaps he would want to make it a home, and if he could keep the homestead he would like to do that, but did not know how he could get along. He had just commenced. His father told him he might go on and do just as he pleased. He would at any time deed the property to him, or whoever he might say. He would leave the whole matter in Louis' control to do as he pleased, provided he paid up his father's debts.

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Q. What arrangement was made with reference to Louis taking care of the indebtedness of the old gentleman?

A. He was to do it; the old gentleman made that proposition; they figured it up in the neighborhood of $2500; I cannot tell exactly; it included everything; I think they talked up everything that I have heard mentioned here to-day; he might sell the property, if he saw fit, to pay these debts, or he might retain the property and pay them; he might do as he pleased; he said at any time he would deed the property to him or anybody else; Louis might keep it himself or do as he had a mind to.

Q. Was that agreement finally consummated between them?

A. It was finally consummated between them."

The witness further testified that on the same evening a note was drawn up, payable to him, and signed by both father and son. On his cross-examination he testified that defendant agreed that the property should be Louis' *on the payment of these debts.* He further testified on cross-examination as follows:

"*Question.* You may now state, if you will, the conversation between Mr. Kelly and his son from the time Mr. Kelly asked his son to sign this note with him up to the time of signing the note.

Answer. The conversation between the two?

Q. Yes, sir.

A. It was quite a lengthy conversation; it would be impossible to repeat anywhere near all of it. A large share of it related to going into business there, moving his family from Ann Arbor, and going into business with his son, arranging their business together.

Q. Let us know what about that; state what was said between them there about it.

A. The old gentleman said he thought he would better move to Farwell and go into the drug business,—build a store; he thought he could help Louis and Louis could help him in the business, and thought it was advisable on the part of both to go into business together; he was all they had, and thought they ought to be together. They had a long conversation in a general way about their mutual interests in this matter that I do not remember.

Q. I would like to have it.

A. It was in a general way, and suggestions were made on

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both sides as to what they would better do. I cannot remember.

Q. What were the interests mentioned?

A. It was talked in this way: that Louis was all the child they had, and his mother wanted to live with Louis, and he wanted to, and all they had was really one consolidated interest, and he thought they would better go into business there,—thought they had better sell the Ann Arbor property.

Q. The old gentleman did?

A. Yes, sir.

Q. His mother and Louis thought they would better sell the Ann Arbor property and go into business up there?

A. Yes, sir.

Q. Proceed.

A. Louis all the time seemed to want to sell the rest and keep the homestead; thought he could get along well enough and do it; rather thought they could put up this store and go into business without selling the homestead; at any rate, they could if I would let this matter run along. I think the matter was talked, if I could at any time get the money and let the security go along. I had money,—this refreshes me in reference to the money matter,—Louis and his father were in the office. Nothing was said, individually, by Kelly, the father, in reference to consolidating their interests; it was all together.

Q. I ask, what was said about joining their mutual interests?

A. I have told you the substance of it.

Q. That conversation was before the note was given?

A. It was just before, or it was just after the note was given; it was all done between 10 and 12 o'clock. I could not tell whether it was just before or just after; it was in that evening.

Q. That is, this conversation about having consolidated interests, and that what was the old gentleman's was or would be Louis'?

A. Yes, sir.

Q. And they ought to sell this property and go up there, pay their debts, and go into business and help each other?

A. Yes, sir.

Q. That was either just before or after signing this note?

A. Yes, sir.

Q. And the signing the note was the closing of the arrangement between them?

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A. Yes, sir; I think it was. They came to a general understanding every way before the note was signed; I think so.

Q. Among other things it was said that the father was to live—the families were to live together?

A. Yes, it was expected they would, I should judge from the conversation.

Q. And the father would live with Louis?

A. Yes, sir.

Q. And connected; a sort of consolidated interest, as one solid family?

A. Yes, sir.

Q. All interested in the same property, and the same business, and in each other?

A. Yes, sir.

Q. That was about the result of the contract, and about the end of it?

A. Yes, sir."

This witness also testified that he supposed that Louis must be owing his father for supporting him and wife while he was going through college, and that Louis ought to be willing to sign the note because he was owing his father.

The complainant was sworn in his own behalf, and testified with reference to the interview of December 31, 1877, when his cousin Gilbert E. Johnson was present, and to the agreement then made. He says the conclusion was that he was to pay the indebtedness and have the property. He does not testify to any consolidation of interests or mutual efforts in carrying on business; but when asked by his counsel what arrangement, if any, was made with regard to his father living with him, and what was said, if anything, about that, he replied: "The talk was that it would be less expense to live with me, and pleasanter for him, so they talked of coming there." On cross-examination he testified as follows:

"*Question.* He had then, had he not, agreed to give you every dollar he had at that time if you would pay his debts?

Answer. He agreed to give me his property.

Q. Had not he agreed to give you every dollar of his property if you would pay his debts?

A. I don't know as he did.

Q. If he had a cent left tell me what it was?

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A. He agreed to give the property to me.

Q. Tell me what it was if he had anything left at that time?

A. I don't think he had anything left unless it was household property.

Q. Then your father was under your control, too, at that time, wasn't he?

A. He acted as agent when I told him to rent the place.

Q. He did not have any support unless you gave it to him?

A. He did what he could, and what he lacked I made up.

Q. That is to say, that if he could not earn a living, after he gave you all the property, you gave him a living?

A. I did not propose to see my father suffer.

Q. He agreed to give you all the property he had, and support himself if he could, and if he could not you would help him; was that the agreement?

A. He agreed to give me the property to pay his debts.

Q. And help himself if he could?

A. There was no special agreement. The talk was that he was to come and live with me.

Q. Was there any agreement with your father that he should be supported by your money?

A. There was no agreement.

Q. He gave you all his property if you would pay his debts?

A. Yes, sir.

Q. And his property was worth about $1000 more than his debts?

A. I don't think it was worth any more.

Q. Are you under any obligation to support your father if he should give you his property as you understood the contract?

A. Not according to the contract. I think every son should support his father.

Q. I am not talking about that; I am talking about the contract. Answer my question, whether, under the contract, you were under any legal obligation to support your father?

A. There was no contract to support father."

He further testified that the note given at that time to Gilbert E. Johnson was as follows:

"$1000. FARWELL, Mich., Dec. 31st, 1877.

For value received we promise to pay Gilbert E. Johnson or order one thousand dollars, on demand, with interest at seven per cent. per annum annually. LOUIS J. KELLY.
O. A. KELLY."

—and that the body of the note was written by him.

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It further appears that in 1878 there was paid upon the defendant's indebtedness $500, and in 1879, $233.50, and March 24th, 1880, $371.73; the whole of which amounts the son claims was paid by him. The father claims that these sums were not wholly paid by the son, but that he assisted, and that his money, or the avails of his property, was used to make up the amount. It is quite clear, however, that quite the larger part, if not all, of this money was furnished by the son, and that the Smith mortgage on the homestead and one of the James mortgages, amounting to five hundred dollars were paid in full and discharged of record; and of the unsecured indebtedness, the Antley note of $115, and the note to the Savings Bank, were also paid.

The foregoing constitute the total amount of indebtedness that had been paid at the time of the filing of the bill, at which time there remained of the secured indebtedness unpaid the two mortgages held by James, and of the unsecured the joint note to Johnson. In December, 1878, the defendant leased his property at Ann Arbor, and, together with his wife, removed to Farwell, and there resided with complainant as one family. In February, 1879, defendant's wife died. He still remained a part of the family up to May, 1880. During this time defendant assisted complainant in attending his office, caring for the horses, and in logging and clearing up about eighteen acres of land. There had been talk of selling the Ann Arbor property and building a drug-store at Farwell with the avails; but the arrangement had not been consummated. It may be noted here that it appears from defendant's testimony, as well as from that of Mrs. Kelly, the wife of complainant, that there never existed between them a very cordial feeling; that defendant was opposed to his son's marriage, but always treated his wife civilly, more on account of her being his son's wife than of any regard for her.

We now come to the cause of all the trouble and the consequent rupture of the confidential and pleasant relations between the father and the son. About the first of May, 1880, defendant married a young lady of twenty-three, as

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alleged in the bill of complaint. This change in the family relations alarmed complainant, "lest his moneys so as aforesaid *advanced* might be endangered and lost." In this emergency he sought the aid of an attorney at Farwell, who, at complainant's request, interviewed the defendant, not as a retained attorney for the complainant, but, as he testifies, merely "as a pacificator." In this interview he says he told the defendant that the doctor was considerably excited, and there would be trouble about this matter, and he would better try and fix it up with the doctor, and wanted him to go and see the doctor. He told him that the doctor claimed that he had paid between $2300 and $2400, and he had better fix it; that he had better transfer his property to the doctor, or secure him and take a life-lease. The defendant testifies that this interview was the first intimation he had of any trouble whatever between his son and himself. He says that the attorney and complainant were both present, and wanted he should go with them to the attorney's office and secure Louis for what he had paid out, and what he had done for defendant, by giving a deed of everything he had; that he told them he would not do it; that he would meet Louis at any time, and he might bring in everything he had paid for him, and then double it, and if he (defendant) had not paid it, he would before he slept. They wanted to know what he had done, and about this putting him through college, and the use of the horses, and that he told them that he had furnished him horses ever since he had been there; that the attorney made the remark that he would buy the horses, and that he (defendant) told him he had not got any horses to sell,—did not care to sell them.

Complainant testifies that upon another occasion he requested his father to give him a deed of his property, or secure him for the debts he had paid, and he refused to do so, giving as a reason that he did not think it prudent; that complainant's wife might influence him against defendant, and he (complainant) might "shove him out." Soon after this defendant was taken quite ill, which fact was known to complainant and he did not call to see him, giving as a reason

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that if any person was sick and wished him to call and see them they must send for him, and giving as a further reason that the people where his father was lying ill were unfriendly to him. On another occasion—whether before or after the commencement of this suit does not appear—the defendant went into complainant's office to make a demand of some personal property defendant claimed complainant had of his, when his son ordered him to leave the office, and, on his not obeying as soon as he desired, he took his father by the ear and lifted him from his chair for the purpose of ejecting him. We make no comment upon this transaction. The son, in giving his testimony, admits, what no person will deny, that he ought not to have done it, and gives as his only excuse that he was in a passion, and in haste to lock his office, in order to leave on the cars to attend a professional call at Clare. The occurrence would seem to justify the father's apprehension that it would not be prudent for him to deed to his son all his property, through fear that he "might shove him out." Just prior to the commencement of this suit, Gilbert E. Johnson was called to Farwell by the son. He came and endeavored to reconcile the parties, but was unable to do so. He then made an arrangement with complainant by which complainant exchanged his own note for the joint note of December 31, 1877, amounting at that time to $1189. This would indicate that this transaction occurred on the 12th of August, 1880, and that no interest had been paid up to that time.

We have now reviewed all the testimony which we deem pertinent to the determination of the question involved, as to whether complainant is entitled, under the pleadings and proofs, to an equitable lien upon the premises described in the bill, or to be subrogated to the rights of the mortgagees for the amount of moneys paid by him to effect their discharge. The sole ground of relief upon which the bill is predicated is contained in the third paragraph, as follows:

"That on the 31st day of December, 1877, as aforesaid, the said defendant made oral agreement with your orator, wherein and whereby it was agreed, understood and con-

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tracted that your orator should assume and pay off all the then existing indebtedness, of whatsoever name or nature, which was or then might be existing and outstanding against the defendant, including the encumbrance upon the aforesaid lands, and that, in consideration therefor, the aforesaid lands should then become, and thereafter be, the property of your orator. And it [was] agreed and understood that whatever was necessary to be done in the way of legal transfers to effect the arrangement, would be done at the seasonable time.

That in consideration of the assumption and payment of said indebtedness by your orator, the said lands should become, and did then and there become, the absolute property of your orator, with the right and power either to sell and convey said lands, and therefrom liquidate the aforesaid indebtedness, or to retain said lands as his own, and pay the said indebtedness, or to make such other or different disposition of said lands as to your orator might seem proper; provided, your orator assumed and paid all of the aforesaid debts and encumbrances."

And he must stand or fall on the case made by the bill.

Allegations without proof, and proof without allegations, are alike unavailing as a basis for equitable relief. The agreement set out in the bill, when fairly construed, makes the payment of all the debts a condition precedent to the conveyance of the property to complainant. Such is the effect of the proviso. There is no allegation in the bill that in case of payment there should exist any equitable lien in favor of complainant, or that he should be subrogated to the rights of the mortgagees. On the contrary, the debts were to be assumed and paid, and as a necessary inference, the liens existing were to be discharged. Passing for the present the question of the validity of the alleged contract, we are satisfied that the proof wholly fails to sustain the allegations of the bill.

That complainant did pay certain of defendant's debts there can be no doubt. But under what arrangement it was done does not satisfactorily appear. Whether such payments were made upon the understanding testified to by defendant, to the effect that Louis agreed to do so in consideration of

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his assisting him through the Medical Department of the University, or whether it was under the later arrangement, as testified to by Johnson on his cross-examination, as the result of what was said when he took the joint note, that what he had was or would be Louis', as he was the only child, and that they had better sell the Ann Arbor property, pay up the debts, and go into business and help each other at Farwell, is left from the testimony in a state of doubt and uncertainty. There is testimony favoring both of these views. The payment by complainant of the interest on the incumbrances prior to December 31, 1877, and the assistance rendered by defendant by sending produce, etc., prior to that date, supports the defendant's statement; while his renting his place at Ann Arbor and removing to Farwell, and uniting his efforts with those of his son in business matters, corresponds with the testimony given by Johnson in reference to the consolidation of their interests. The testimony of Johnson, as modified by him on cross-examination, leaves the complainant's statements entirely unsupported by any reliable testimony.

It is presuming upon our credulity to ask us to believe that the father should agree to convey all his property to his son except his household goods,—worth considerably more than his indebtedness,—on the bare assumption that the son should pay all his debts at that time existing, with no agreement as to future support of himself and wife. If the contract was made as alleged, by what principle of equity has the complainant the right to the relief prayed for, without full performance on his part? He engaged to pay all the debts, and he has stopped far short of performance. There remain two mortgages upon the land unpaid, the principal of which amounts to $500. This appears from the bill. The note of $1000 he claims to have paid by giving his own note in exchange, but when on the witness stand he stated that he still held this note of $1000, and had never offered to give it up to his father, and, under advice of his counsel, he refused to say that his father might have it then. He has not been prevented from performance by defendant, and yet,

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without fulfilling his part of the alleged contract, or showing any good reason why he does not do so, he asks that defendant be compelled to perform his part thereof, the effect of which would be to make a new and different contract from that which complainant claims the parties had agreed upon, and to relieve the complainant from the obligations he claims to have assumed, and to restore the liens which he had undertaken to discharge. It is only to prevent fraud and subserve justice that equity engrafts the wholesome provisions of subrogation or of equitable lien upon a transaction; and it should never be done where it would work injustice. To subrogate complainant to the rights of the mortgagees of the mortgages discharged, or to engraft an equitable lien upon the property, would not be carrying out the intent of the parties to the contract set up in the bill. That looked to the payment and extinguishment of the debts and the discharge of the mortgages. What justice is there in replacing the liens in favor of complainant and thus relieving him from the performance of the contract on his part?

There are other reasons why the complainant is not entitled to the relief prayed for. In order to lay the foundation for an equitable lien upon real estate there must exist—*first*, a contract in writing out of which the equity springs, sufficiently indicating an intention to make some particular property, therein identified, a security for the debt or obligation, or whereby the party promises to convey or assign or transfer the property as security. Pom. Eq. Jur. §1235. The intent to give security being clear, equity will treat the instrument as an executory agreement to give security. In the case before us there is no agreement in writing, and there is nothing in the verbal agreement which indicates an intention to give security. Or *second*, in the absence of such contract, where, from the relations of the parties, equity will declare a lien out of considerations of right and justice, based upon those maxims which lie at the foundation of equity jurisprudence. Such are the cases when one joint owner, acting in good faith, and for the joint benefit, makes permanent improvements upon the property which add a permanent value

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to the estate; or when a party, innocently and in good faith, supposing himself to be the owner, makes permanent improvements or repairs, which permanently enhance the value of the property, the real owner, when he seeks the aid of equity to establish or enforce some equitable right or claim to the property, upon the principle that he who asks equity must do equity, will be required to pay the amount expended. So with regard to what are known as partners' liens. But in all such cases the foundation for relief must be laid in the bill, and the complainant must set out such a state of facts and circumstances, and prove them on the hearing, as shows that in equity and good conscience he is entitled to the relief prayed for. That has not been done in this case. The complainant sets forth no case except of a verbal contract broken, or at least not performed by himself, and he does not make a case by his proofs which calls for equitable interposition. The contract set out, being void under the Statute of Frauds, cannot be used as the foundation of any legal or equitable right. If a party pays money under such a void contract he may recover it back in assumpsit, but a court of equity will not create a lien upon real estate in favor of the party paying unless, from the nature of the transaction rights have sprung up which ought to be held binding upon the specific property.

Complainant's counsel insist that the complainant paid these moneys and assumed these liabilities on the strength of the promises of defendant that these lands were complainant's, and that the formal transfer should be made whenever he wished it; and that complainant is entitled to an affirmance of the decree pronounced below, upon the doctrine of subrogation. In no event, however, could such a claim be maintained with respect to the money paid prior to December 31, 1877,—the time it is claimed the contract was made. If we were satisfied from the testimony that these mortgages were paid off in pursuance of the contract, as complainant claims, and because of an unwillingness or refusal to perform, on the part of defendant, on account of its illegality, or because of an unexpected change in the family relations,

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which interfered with or prevented the contract from being carried out according to the original intention of the parties, we should feel like granting the relief so far as to subrogate him to the rights of the mortgagees to the extent of payments made under such contract, subject to such rights as may have attached in the mean time. But the difficulty in the way of granting such relief is that we are not satisfied, from all the evidence in the case, that the contract set up in the bill was agreed upon between the parties; or that the payments made were made under that contract; or whether they were made, as the one prior to December 31, 1877, was made, in pursuance of some agreement or understanding that complainant should assist in paying these debts, in consideration of benefits received in obtaining and getting started in his profession. It may be that he expected to inherit the property, and that may have operated as one inducement to pay them, as seems to be shadowed forth in the testimony of Mr. Johnson; but if that were the case, it would form no basis for a subrogation founded upon an alarm occasioned by the second marriage, that there might exist a potentiality of other heirs arising to question his inheritance.

We think that the decree below should be reversed, and one entered here dismissing the bill of complaint, with costs of both courts.

The other Justices concurred.

THE MERCHANTS' BANK OF CANADA v. ALBERT R. SCHULENBERG, IMPLEADED, &C.

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54	49
142	44

Nonsuit—Set-off.

Whether nonsuit can be taken after set-off has been pleaded and defendant has claimed judgment for a balance—Q. Order permitting it affirmed by equal division.

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Error to Wayne. (Chambers, J.) April 9.—June 11.

ASSUMPSIT. Defendant brings error. Affirmed.

Henry C. Wisner for appellant.

Moore & Canfield and *G. V. N. Lothrop* for appellee. Nonsuit may be taken after plea of set-off: *M'Credy v. Fey* 7 Watts 496; *Sewall v. Tarbox* 30 Me. 27; *McCann v. Boyers* 8 B. Mon. 285; *Fowler v. Lawson* 15 Ark. 148; *Wooster v. Burr* 2 Wend. 295; *Usher v. Sibley* 2 Brev. 32.

SHERWOOD, J. This case has once before been in this Court (48 Mich. 102) but the questions then raised have no bearing upon the points made in the present record. The action is assumpsit upon a Canadian judgment rendered in the Court of Queen's Bench in the province of Ontario. The plea was the general issue, with notice of set-off and other special matter in bar of the suit. Under the set-off defendant claimed to be entitled to a judgment. There was no contest as to the amount of the plaintiff's claim upon the trial. The record of the Ontario judgment was introduced in evidence without objection, and the plaintiff's counsel rested his case.

The defendant then examined two witnesses upon his part, and, when nearly ready to close the defense, counsel for plaintiff announced to the court that he was taken by surprise by the defendant's testimony; was not then prepared to meet it; and asked leave of the court to submit to a nonsuit, with the right to move to set the same aside. This application of plaintiff's counsel was objected to by the defendant, on the ground that since the suit was commenced the Statute of Limitations had commenced to run against the claim stated in his notice of set-off. The objection was overruled by the court, and counsel for the defendant excepted. Counsel for defendant thereupon admitted the plaintiff's claim of $531,000 stated in his declaration, and claimed his readiness to make proof of his offset to the amount of $646,348, and insisted upon his right to proceed with the trial, establish his claim, and have a verdict for the surplus in his favor, and requested the court to permit him to do so. Counsel for

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plaintiff objected, the court sustained the objection, and defendant's counsel again excepted. These two exceptions are now before us for consideration, and only these.

The question is simply this: Whether, under our statute, when the defendant has given notice of set-off and claims a balance in his favor, the plaintiff can discontinue his suit, or be permitted to discontinue it, without the consent of and against the wishes of the defendant.

Set-off is a mode of defense. By it the existence of the demand sued upon is, in a certain sense, admitted; but at the same time, the defendant sets up a demand against the plaintiff to counterbalance it, in whole or in part, and under our statute the defendant may have judgment for any balance found in his favor. Originally, the defendant's claim could only be allowed to the extent of the plaintiff's demand proved on the trial. Toml. Law Dict.; Babbington on Set-off, 1. At common law the defendant was in no instance allowed to recover judgment for damages for a positive claim against the plaintiff. To obviate the rigor of this rule of law, and to avoid a multiplicity of suits where mutual cross-demands existed, unconnected with each other, and to have the whole adjudicated upon in one action, was the great object of the statute of set-off. *Ward v. Fellers* 3 Mich. 281.

The right of set-off at law is given by statute, and is, of course, limited by it. The common law never recognized it. Bacon Abr. tit. "Set-off;" *Woods v. Ayres* 39 Mich. 345.

How. Stat. § 6886 of the chapter authorizing set-off in justice's court, reads as follows: "If the amount of set-off duly established, be equal to the plaintiff's debt, judgment shall be entered for the defendant, with costs; if it be less than the plaintiff's debt, the plaintiff shall have judgment for the residue only, with costs; if it be more than the plaintiff's debt, and the balance found due to the defendant from the plaintiff in the action be three hundred dollars or under, judgment shall be rendered for the defendant for the amount thereof, with costs; and execution shall be awarded as upon a judgment in a suit brought by him; but no such judgment shall be rendered against the plaintiff when the

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contract which is the subject of suit, shall have been assigned before the commencement of such suit, nor for any balance due from any other person than the plaintiff in the action." The same provisions are made applicable to proceedings in courts of record, in cases of set-off. See How. Stat. §§ 7367, 7368.

The object of the statute is beneficial and equitable, and in its operation it proceeds upon equitable principles. *Downer v. Eggleston* 15 Wend. 55, 56.

The doctrine of set-off was borrowed from the doctrines of compensation of the civil law, and constituted an important part thereof. 2 Poth. Obl. No. 13, p. 99; *Duncan v. Lyon* 3 Johns. Ch. 359; *Reab v. McAlister* 8 Wend. 115; *Whitaker v. Rush* 1 Ambler 407. This doctrine was also followed to some extent in the English courts before the statutes of set-off were enacted. See *Chapman v. Derby* 2 Vern. 117; *Lindsay v. Jackson* 2 Paige 581. And while it is true that the right of set-off is statutory, and we cannot enlarge the right beyond what the statute reasonably allows, yet the courts may, and it is their duty, in determining, regulating and applying the practice, in securing and enforcing that right, to be liberal in their action, and to give the law such construction as will secure all the benefits and advantages intended.

The right of the plaintiff at common law to voluntarily submit to a nonsuit, or to discontinue his suit at any time before the jury have rendered their verdict, is well supported by the authorities, and has always been the practice in this State when no set-off has been pleaded. 3 Chit. Pr. 910; 1 Burrill's Pr. 241; *Wooster v. Burr* 2 Wend. 295; Circuit Court Rule 26; 1 Green's Pr. 447, 279; *Slocomb v. Thatcher* 20 Mich. 52. I think that when the set-off is purely defensive, and no affirmative action is required on the part of the court or jury, the right of the plaintiff to become nonsuited at his pleasure, before verdict or judgment, should be in the discretion of the court; which discretion should not be exercised against the right, except in cases where the rights of the defendant might be prejudiced.

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Under the statute, however, authorizing a judgment to be rendered in case of set-off for any balance found due the defendant upon the trial, the rule is and should be different. In such a case, really two suits are pending before the court to be tried at the same time. In the one, the plaintiff has the affirmative of the issue; and in the other, the defendant has the affirmative. It is only after the trial, when the extent of each party's claim has been ascertained, that the liquidation of the smaller claim occurs by way of set-off, or can be made by the court or jury.

The statute requires the defendant to bring forward his claim for adjudication at the time the plaintiff brings his suit, and thereby determines the time when the defendant shall have his claim adjudicated, at the peril of doing so at his own expense. In all other respects, the case stands as though two separate suits were brought to determine the rights of the parties; and I fail to see why both cases should not be governed by the same rules, and receive the same treatment at the hands of the court. Simple justice requires this, and I can see no reason why the equitable rules upon which the whole doctrine of set-off is based should not be carried out in the practice in these cases. Adopting this rule, the plaintiff would have no more right to discontinue the defendant's suit than the latter would that of the former; and such, I think, should be the law.

These views find support in the following authorities, which I think should govern this case: *Thomas v. Hill* 3 Tex. 270; *Bradford v. Hamilton* 7 Tex. 55, 58, 59; *Francis v. Edwards* 77 N. C. 271, 275; *Riley v. Carter* 3 Humph. (Tenn.) 230; *Rees v. Van Patten* 13 How. Pr. 258; *Cockle v. Underwood* 3 Duer 676; *Van Alen v. Schermerhorn* 14 How. Pr. 287.

I think the exceptions of defendant's counsel to the action of the court, in not allowing the defendant to make full proof of his claim and take judgment therefor, were well taken.

The judgment must be reversed with costs and a new trial granted.

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CAMPBELL, J. concurred.

COOLEY, C. J. In this case the defendant relied upon a set-off, which, he claimed, was larger than the plaintiff's demand, and he brings the case to this Court, assigning for error the order of the circuit court permitting the plaintiff, notwithstanding his objection, to submit to a nonsuit.

The general right of the plaintiff to discontinue his suit or to submit to a nonsuit, at any time before verdict, is undoubted; and in the absence of any statute taking away the right, it exists in the cases where set-off is relied upon, to the same extent as in other cases. This is fully recognized in *Cummings v. Pruden* 11 Mass. 206, and *Branham v. Brown* 1 Bailey 262. In several states statutes have been passed taking away the right, but we have no such statute. The fact that the statute of Set-offs permits judgment to be taken by the defendant for the balance found due him, does not preclude a discontinuance. *Cummings v. Pruden* supra.

But it is said there are decisions to the contrary of these, and several are referred to. The Texas cases are not in point, as they are decided under the civil law, which does not prevail in this State. *Egery v. Power* 5 Tex. 501; *Walcott v. Hendrick* 6 Tex. 406; *Bradford v. Hamilton* 7 Tex. 55. The case of *Francis v. Edwards* 77 N. C. 271 was decided upon a construction of the Code of that state, and therefore has no bearing. In *Riley v. Carter* 3 Humph. 230, the defendant had obtained judgment for his set-off in justice's court, and the plaintiff removed the case to the circuit court by certiorari, and then, in that court, was given leave to dismiss his suit. This was palpable error, and the court so held; but we discover no analogy between that case and this. The defendant had his judgment, and unless error was shown, had a right to retain it. The three New York cases of *Cockle v. Underwood* 3 Duer 676; *Rees v. Van Patten* 13 How. Pr. 258; and *Van Alen v. Schermerhorn* 14 How. Pr. 287, are not in point, because decided under the state Code; but so far as they can be considered as having a bearing, they are against the defendant instead of for him, for they

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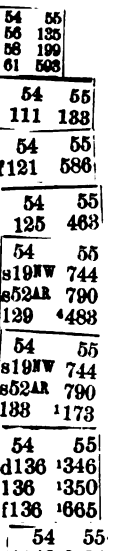
all recognize the power of the court in its discretion to permit the plaintiff to discontinue; which is all that is necessary to sustain this judgment.

The judgment should be affirmed.

CHAMPLIN, J. concurred.



FREDERICK LEWIS v. FLINT & PERE MARQUETTE RY CO.

Railway companies—Proximate cause of injury.

1. A railway passenger was carried a little past his station on a dark night, and on leaving the train was misinformed by the conductor as to where he was. He soon discovered that he was south of a cross-road he meant to take in going home, instead of north of it as he was told when he landed. He knew the neighborhood and knew that where the road crossed the track there were cattle-guards and culverts on both sides of it. If he had landed where he was told he had, he had meant to follow the track south to the road and pick his way across the culvert though he might have shunned it by taking a side path. In approaching the road from the south he determined to cross the other culvert in the same way, and it is not clear that on that side of the road he could have done any better. But when he neared the cattle-guard, his eyes deceived him and his foot slipped, and in trying to regain his balance he fell into the culvert, which he supposed was farther off, and was seriously hurt. *Held*, that the company's negligence in carrying him past the station and in misinforming him was not the proximate cause of the injury, which was purely accidental, and he could not recover for it.
2. Damages cannot be recovered for purely accidental injuries.
3. In an action for injury the courts cannot go back of the proximate cause, and as between other causes preceding that, select one rather than other upon which to permit a recovery.
4. In an action for injury the neglect of any precaution by the plaintiff can only raise a question of contributory negligence for the jury.

Error to Wayne. (Speed, J.) April 10–11.—June 11.

CASE. Plaintiff brings error. Affirmed.

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Blodget & Patchin and *C. I. Walker* for appellant. The rule as to proximate damages is more liberal in cases of tort than in cases of contract: Shearm. & Redf. on Damages § 597; Sedg. Damages § 9; Field on Damages § 660; Thompson on Carriers 545; *Bowas v. Pioneer Tow Line* 2 Sawy. 30; *Brown v. Chic. & St. Paul Ry. Co.* 54 Wis. 354; such an injury as is done by a fire that catches from a house which was set on fire by negligence is not too remote to sustain a recovery against the original wrong-doer: Cooley on Torts 76; Field on Damages 46; 1 Thomp. Neg. 169; Whart. Neg. §§ 148, 156; *Smith v. Lond. & S. W. R. R. Co.* L. R. 6 C. P. 20; *Milw. R. Co. v. Kellogg* 94 U. S. 473; *Kellogg v. C. & N. W. Ry. Co.* 26 Wis. 262; *Fent v. T. P. & W. R. Co.* 59 Ill. 349; *Wiley v. West Jersey R. Co.* 44 N. J. L. 247.

W. L. Webber and *O. F. Wisner* for appellee cited on proximate cause *Blake v. Newfield* 68 Me. 365; *Hyde v. Jamaica* 27 Vt. 458; *Trow v. Vt. Cent. R. R.* 24 Vt. 494; *People v. Rockwell* 39 Mich. 503; *Mich. Cent. R. R. v. Burrows* 33 Mich. 6; *Morrison v. Davis* 20 Penn. St. 171; *Flower v. Adam* 2 Taunt. 314; *The Dubuque Wood Ass'n v. Dubuque* 30 Ia. 176; *Marble v. City of Worcester* 4 Gray 395; *Stiles v. A. & W. P. R. R.* 65 Ga. 370: 8 A. & E. R. R. Cas. 195; 2 Thomp. Neg. 1083, 1098; *Hobbs v. Lond. & S. W. R. R.* L. R. 10 Q. B. 111: 13 Am. L. Reg. 15; *McClary v. Sioux &c. R. R.* 3 Neb. 44; *Pullman Car Co. v. Barker* 34 Am. R. 89; *Rigby v. Hewitt* 5 Exch. 240; *Fairbanks v. Kerr* 70 Penn. St. 86; *McGrew v. Stone* 53 Penn. St. 436; *Scott v. Hunter* 46 Penn. St. 192; *Atchison &c. R. R. Co. v. Stanford* 12 Kan. 354; *Proctor v. Jennings* 6 Nev. 83; *Doggett v. Richmond &c. R. R. Co.* 78 N. C. 305; *Phillips v. Dickerson* 85 Ill. 11; *Hoag v. L. S. & M. S. R. R. Co.* 85 Penn. St. 293; *Lancaster v. Kessinger* 12 Rep. 636; *Wood v. L. S. & M. S. R. R. Co.* 49 Mich. 370.

Cooley, C. J. Action to recover damages for a personal injury. The facts as they appeared on the trial were as follows:

The plaintiff resides in the township of Huron, a few miles east of Belden station on the road of defendant. He was at Wayne station on the evening of January 12, 1883, awaiting the train which was to go south past Belden in the night. The train left Wayne at 3:05 in the morning of the 13th, and

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he procured his ticket and took passage for Belden, where the train was due at 3:30. The night was dark, cold and wet. The train stopped when "Belden" was called, and plaintiff got off. Belden was only a flag station for this train, and there was no one in charge of the station-house, and no light there. When plaintiff got off the train he was told by the brakeman or conductor that they had run by the station about two car lengths, and he replied that if that was all, it was no matter, as he had to go that way. An east and west highway crosses the railroad about twenty-four rods south of the station-house, which the plaintiff would take in going to his home. If he was two car lengths beyond the station-house, he would still be north of the highway; and supposing that to be the case, he followed the track along south, in preference to going back to the station-house from which a passage east of the track would have led him to the highway. The plaintiff knew the place well, and knew that on the track he must cross an open cattle-guard to reach the highway. He had crossed this before, and sometimes found a plank laid over it. Passing on he soon came to trees which he knew were some distance south of the highway, and he then knew the information given him as to where he was when he alighted from the train was erroneous. He turned about to retrace his steps, and followed the track in the direction of the highway. This he did carefully, because it was very dark, and he knew there was an open cattle-guard on the south side of the highway, as well as on the north side. He was looking for this cattle-guard constantly and carefully. There were burning kilns near to the track on his right, and the smoke from these affected his eyes, but he saw a switch light, which he knew was near the crossing, but which at the time was too dim to aid him. He continued to approach the cattle-guard carefully, intending, if there was a timber or plank over it, to cross upon that; and if not, then to pass down into it and climb out. In the dim light he saw what he believed to be the cattle-guard, which seemed to be several paces off, but at the very next step one foot slipped, and as he attempted to save himself by springing upon the other, the other foot caught, and

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he was precipitated into the cattle-guard, and received an injury of a very serious and permanent nature. He was for a time senseless, but then succeeded in drawing himself out by his elbows,—not being able to use his lower limbs,—and with great difficulty he reached a neighboring tavern, where he was cared for.

On the trial a claim was made on the part of the defense that the plaintiff was negligent in following the railroad track back to the cattle-guard and in attempting to cross it, when he might have left the track to the right and passed along the field until he came to the highway; and evidence was given to show that he would have encountered no impediments. But, in such a night as this was, it is not clear that the field would have afforded a safer passage than the highway; and his failure to take it would at most only raise a question of negligence on his part which would necessarily go to the jury. *Detroit &c. R. Co. v. Van Steinburg* 17 Mich. 118; *Billings v. Breinig* 45 Mich. 72; *Chicago &c. R. R. Co. v. Miller* 46 Mich. 537; *Marcott v. Marquette &c. R. R. Co.* 47 Mich. 7. In this case the court took the case from the jury, and directed a verdict for the defendant.

This direction is understood to have been given on the ground that the injury which the plaintiff suffered was not proximate to the wrong attributable to the defendant, and for that reason would not support an action.

The wrong of the defendant consisted in carrying the plaintiff past the station, and then giving him erroneous information as to where he was. If the injury suffered was not a proximate consequence of this wrong, the instruction of the court was right; otherwise not. The difficulty here is in determining what is and what is not a proximate consequence in contemplation of law.

For the plaintiff, the cases are cited in which it has been held that one whose negligence causes a fire by the spreading of which the property of another is destroyed, is liable for the damages, though the property for which compensation was claimed was only reached by the fire after it had passed through intervening fields or buildings. *Kellogg v. C. & N.*

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W. R. Co. 26 Wis. 223; *Fent v. Toledo &c. R. Co.* 59 Ill. 349; *Wiley v. West Jersey R. Co.* 44 N. J. Law 248; *Milwaukee &c. R. Co. v. Kellogg* 94 U. S. 469. But these cases, we think, are not analogous to the one before us. The negligent fire was the direct and sole cause of the injury in each instance, and there was no intervening cause whatever. The cases are in harmony with *Hoyt v. Jeffers* 30 Mich. 181. The case of *Pennsylvania Co. v. Hoagland* 78 Ind. 203 seems, at first view, to be more in point. The action in that case was brought by a woman, who, in consequence of misinformation on the part of the person in charge of a railroad train, left the car in the night-time at the wrong stopping place, and wandered about for an hour or more before she could find shelter, taking cold from exposure. But here, as in the other cases cited, there was no cause intervening the wrong complained of and the resulting injury, and the question of proximate cause does not appear to have been raised in the case. *Smith v. Steam Packet Co.* 86 N. Y. 408 is also relied upon, but it is unlike this in the important particular that the intervening cause, which, after the first wrong on the part of the defendant, operated to bring injury to the plaintiff, was a neglect of proper care, which the court held was due from the defendant to the plaintiff under the circumstances, so that all the injury received was a proximate result of the defendant's neglects of duty.

The case of *Brown and Wife v. Chicago, Mil. & St. Paul Ry. Co.* 54 Wis. 342: 3 A. & E. R. R. Cas. 444, more nearly resembles the present case than any other to which our attention has been called by counsel for the plaintiff. The facts, as stated in the prevailing opinion, are the following: The plaintiffs, with their child, seven years old, were being carried on defendant's cars, with Mauston for their destination, and when they arrived at a station three miles east of Mauston they left the train, under the direction of the brakeman, who told them they were at Mauston. It was in the night; it was cloudy and wet; there was a freight train standing on a side track, where they were put off the train; there was no platform, and no lights visible, except on the freight train.

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Plaintiffs soon ascertained they were not at Mauston, but did not know where they were. They did not see the station-house, though there was one, hidden from their view by the freight train. They supposed they were at a place two miles east, where the train sometimes stopped, but where there was no station-house. They started west on the track towards Mauston, expecting to find a house where they might stop, but did not find one until they came to a bridge, within a mile of Mauston, and then they thought it easier to go on to that place than to seek shelter at the house, which was a considerable distance from the track. Mrs. Brown was pregnant at the time, and when she arrived at Mauston was quite exhausted. She had, during the night, severe pains, which continued from time to time, and were followed by flowing, and at length by a miscarriage, inflammation and serious illness. The plaintiffs claimed that the miscarriage and subsequent sickness were all caused by the walk Mrs. Brown was compelled to take to get from the place where they were left by the train, to Mauston, and the question in the case was whether the defendant was liable for the injury to Mrs. Brown, admitting it to have been caused by her walk. The majority of the court, finding that "there was no intervening independent cause of the injury other than the act of the defendant," and that "all the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant," held that "the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate, and not the remote, cause of the injury," quoting Lord Ellenborough in *Jones v. Boyce* 1 Stark. 493, that, "if I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

The case of *Pullman Palace Car Co. v. Barker* 4 Col. 344: s. c. 34 Am. Rep. 89, is opposed to the case in Wisconsin, as are also *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 111, and *Francis v. St. Louis Transfer Co.* 5 Mo. App. 7. But it is not necessary to express any opinion upon the conflict which these cases disclose, because in the case before

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us there was an independent cause intervening the fault of the defendant and the injury the plaintiff sustained, and from which the injury resulted as a direct and immediate consequence.

To show what is understood by intervening cause, it may be useful to refer to a few cases. *Livie v. Janson* 12 East 648, was a case of insurance on a ship warranted free of American condemnation. In sailing out of New York she was damaged by perils of the sea, stranded and wrecked on Governor's Island, and then seized and condemned. It was the peril of the sea that caused the vessel to be seized and condemned; but as the condemnation was the proximate cause of the loss, the insurers were held not liable. A similar case is *Delano v. Ins. Co.* 10 Mass. 354, where a like result was reached.

In *Tisdale v. Norton* 8 Met. 388, the facts were that a highway was defective, and the plaintiff, who was using it, went out of it into the adjoining field, where he sustained an injury. He brought suit against the town, whose duty it was to keep the highway in repair. But the court held that only as a remote cause could the injury of the plaintiff be said to be due to the defect in the highway. The proximate, not the remote, cause is that which is referred to in the statute which gives an action against the town; and the proximate cause in this case was outside the highway; not within it.

In *Anthony v. Slaid* 11 Met. 290, the plaintiff, who was contractor with a town to support for a specified time and for a fixed sum all the town paupers in sickness and in health, brought suit against one who, it was alleged, had assaulted and beaten one of the paupers, as a consequence of which the plaintiff was put to increased expense for care and support; but the action was held not maintainable.

In *Silver v. Frazier* 3 Allen 382, it was decided that a principal whose agent has disobeyed his instructions, induced to do so by the false representations of a third party, cannot maintain an action against such third party for the damage sustained. Said Bigelow, C. J.: "The alleged loss or injury suffered by the plaintiff is not the direct and immediate

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result of the defendant's wrongful act. Stripped of its technical language, the declaration charges only that the agent employed by the plaintiff to do a certain piece of work disobeyed the orders of his principal, and was induced to do so by the false statements of the defendant. In other words, the plaintiff alleges that his agent violated his duty and thereby did him an injury, and seeks to recover damages therefor by an action against a third person, on the ground that he induced the agent by false statements to go contrary to the orders of his principal. Such an action is, we believe, without precedent. The immediate cause of injury and loss to the plaintiff is the breach of duty of his agent. This is the proximate cause of damage. The motives or inducements which operated to cause the agent to do an unauthorized act are too remote to furnish a good ground of action to the plaintiff."

In *Dubuque Wood & Coal Ass'n v. Dubuque* 30 Iowa 176, the facts were that the plaintiff had a quantity of wood deposited at one end of a bridge, which was to be taken over the bridge into the city of Dubuque. The bridge was out of repair, and while awaiting repair by the city, whose duty it was, the wood was carried away by a flood. The plaintiff sued the city for the value of his wood; but it was held he could not recover. Beck, J., in deciding the case, illustrates the principle as follows: "An owner of lumber deposited upon the levee of the city of Dubuque, exposed to the floods of the river, starts with his team to remove it. A bridge built by the city which he attempts to cross, from defects therein falls, and his horses are killed. By the breaking of the bridge and the loss of his team, he is delayed in removing his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses. The secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which, finally, caused its loss. Damage on account of the first is recoverable, but for the second, is denied."

Similar to this are *Daniels v. Ballantine* 23 Ohio St. 532:

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s. c. 13 Am. Rep. 264; and *McClary v. Sioux City &c. R. R. Co.* 3 Neb. 44: s. c. 19 Am. Rep. 631. In each of these cases the negligence of the defendant left the property of the plaintiff where, by an act of God,—in one case a flood, and in the other a tornado,—it was lost or injured, and in each the act of God, and not the negligence, was held to be the proximate cause of injury.

In *Scheffer v. Railroad Co.* 105 U. S. 249, it appeared that, by a collision of railroad trains, a passenger was injured, and becoming thereby disordered in mind and body, he, some eight months thereafter, committed suicide. Action was brought against the railroad company as the negligent cause of his death. Miller, J., speaking for the court, and referring to *Insurance Co. v. Tweed* 7 Wall. 44, and *Milwaukee &c. R. R. Co. v. Kellogg* 94 U. S. 469, said: "The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death. The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months disease and medical treatment to the original accident on the railroad."

In *Bosch v. Burlington &c. R. R. Co.* 44 Iowa 402, the plaintiff's house took fire, and the fire department, because, as was alleged, of the wrongful occupation and expansion of the river bank, were unable to get to the river to obtain water for putting out the fire. Plaintiff sued the defendant for the loss of his property, but the court said the acts of defendant complained of "have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery."

In this last case *Metallic Compression Co. v. Railroad Co.* 109 Mass. 277: s. c. 12 Am. Rep. 689, was referred to and distinguished. The facts there were that the plaintiff's building was on fire, and water was being thrown upon it through hose, when an engine of the defendant was recklessly run upon the

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hose and severed it, thereby defeating the efforts to extinguish the fire, which otherwise were likely to succeed. In that case the relation of the plaintiff's injury to the defendant's act was direct and immediate. So it was also in *Billman v. Indianapolis &c. R. R. Co.* 76 Ind. 166; *Lane v. Atlantic Works* 111 Mass. 136; and *Ricker v. Freeman* 50 N. H. 420,—all of which are ruled by the *Squib Case* (*Scott v. Shepherd* 2 W. Bl. 892); and so, perhaps, are *Fairbanks v. Kerr* 70 Penn. St. 90: s. c. 10 Am. Rep. 664; and *Lake v. Milliken* 62 Me. 240: s. c. 16 Am. Rep. 456.

In *Henry v. St. Louis &c. R. R. Co.* 76 Mo. 288: s. c. 43 Am. Rep. 762, it appeared that the plaintiff was wrongfully commanded to get off a caboose of the defendant, where he had a right to be. He obeyed the command, and while upon the ground, stepped upon a track, where he was run upon and injured by a train. Hough, J., speaking for the court, said: "It is perhaps probable that if the plaintiff had not been ordered out of the caboose, he would not have been injured, but this hypothesis does not establish the legal relation of cause and effect between the expulsion and the injury. If the plaintiff had not left home he certainly would not have been injured as he was, but his leaving home could not, therefore, be declared to be the cause of his injury. As the plaintiff's injury was neither the ordinary, natural nor probable consequence of his expulsion from the caboose, such expulsion, however it might excite our indignation, in the absence of any regulation of the defendant to justify it, cannot be considered in this action, and the legal aspect of the case is precisely the same that it would have been if no such expulsion had taken place. It is to be regarded as if the plaintiff had gone to the caboose and could not get in because it was locked, or being able to get in, chose to remain outside."

Further reference to authorities is needless. The application of the rule that the proximate, not the remote cause is to be regarded, is obscure and difficult in many cases, but not in this. By the wrong of the defendant the plaintiff was carried past the station where he had a right to be left,

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and beyond where he had a right, from the information received from defendant's servants, to suppose he was when he left the car. For any injury or inconvenience naturally resulting from the wrong, and traceable to it as the proximate cause, the defendant may be held responsible. But before any injury had been sustained, the plaintiff discovered where he was, and started back for the road which he had intended to take. Whatever danger there was to be encountered in the way was to be found in the cattle-guard, and this he understood and calculated upon. Evidently it did not appear to him of a formidable nature; for, on the supposition that he was north of the highway when he left the train, he had voluntarily started south with the expectation of crossing the cattle-guard on that side, over which he might or might not find a plank laid, when by stepping back a few rods, where he supposed the station-house to be, he might pass from thence out to the highway by the passage-way for persons and vehicles leading from the station-house to it, and thereby avoid the cattle-guard altogether. It is very clear that he did not anticipate danger. Neither, probably, would any other person have anticipated it. The crossing was a simple matter; it was only to ascertain first whether a plank or timber was laid across, and if so, to cross upon it, and if not, to step down into the excavation, and out on the other side. Where was he to look for danger? The night was dark, it is true; but even by the sense of feeling, when he knew he was within a few feet of the cattle-guard, one would expect him to be able to determine its exact location. But then something happened which it is evident that the plaintiff, with full knowledge of all the facts, did not at all expect and had not feared. Misled apparently by visual deception, he moved forward under a supposition that the cattle-guard, upon the brink of which he already stood, was some paces off, and this deception, with the slipping of his foot, concurred to produce the injury.

What was this but pure accident? It was an event which happened unexpectedly and without fault. The defendant or its agents had not produced the deception or caused the

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foot to slip; and such wrong as the defendant had been guilty of was in no manner connected with or related to the injury except as it was the occasion for bringing the plaintiff where the accident occurred. It was after the plaintiff had been brought there that the cause of injury unexpectedly arose. If lightning had chanced to strike the plaintiff at that place, the fault of the defendant and its relation to the injury would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now. If the accidental discharge of a gun in the hands of some third person had wounded the plaintiff as he approached the cattle-guard, the connection of defendant's wrong with the injury would have been precisely the same which appears here. But the proximate cause of injury in the one case would have been the act of God; in the other, inevitable accident; but not more plainly accident than was the proximate cause here. Back of that cause in this case were many others, all conducing to bring the plaintiff to the place of the danger and the injury; the act of the defendant was the last of a long sequence; but as between the causes which precede the proximate cause, the law cannot select one rather than any other as that to which the final consequence shall be attributed, and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless.

The injury being the result of pure accident, the party upon whom it has chanced to fall is necessarily left to bear it. No compensation can be given by law in such cases. *Weaver v. Ward* Hob. 134; *Gibbons v. Pepper* 1 Ld. Raym. 38; *Losee v. Buchanan* 51 N. Y. 476: s. c. 10 Am. Rep. 623; *Vincent v. Stinehour* 7 Vt. 62: s. c. 29 Am. Dec. 145; *Morris v. Platt* 32 Conn. 75; *Brown v. Collins* 53 N. H. 442: s. c. 16 Am. Rep. 372; *Bizzell v. Booker* 16 Ark. 308; *Marshall v. Welwood* 38 N. J. Law 339: s. c. 20 Am. Rep. 394; *Paxton v. Boyer* 67 Ill. 132: s. c. 16 Am. Rep. 615; *American Express Co. v. Smith* 33 Ohio St. 511: s. c. 31 Am. Rep. 561; *Plummer v. State* 4 Tex. App. 310: s. c. 30 Am. Rep. 165; *Parrot v. Wells* 15

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Wall. 524; *Holmes v. Mather* L. R. 10 Exch. 261. A case like this appeals strongly to the sympathies, but sympathy cannot rule the decision.

Upon the undisputed facts of the case the plaintiff has no right of action for the injury which has befallen him, and the circuit court was correct in so holding. The question what judgment shall be rendered in the case is for the present reserved.

The other Justices concurred.

SAMUEL E. BYRNE v. WILLIAM H. ROOD AND JOHN E. WARD.

Cloud on title to joint interest—Statute of Frauds.

A defaulting officer quitclaimed to one of the sureties on his official bond the entire title to lands in which another person had a joint interest with himself, the grantee assuring him that his conveyance carried his own title only and that the interests of other persons could be arranged afterwards. *Held*, that the owner of the joint interest could compel the grantee, by bill in equity, to convey to him his interest; and that the grantee could not plead the Statute of Frauds.

Appeal from Marquette. (Grant, J.) April 15.—June 11.

BILL to clear title. Defendant Rood appeals. Affirmed.

M. H. Maynard and *F. A. Baker* for complainant. The admission of a trust in an answer in chancery, is a sufficient declaration of the trust in writing to answer the requirements of the Statute of Frauds: *Patton v. Chamberlain* 44 Mich. 5; and if the parol agreement or trust is not denied by the answer, the defendant must set up the Statute of Frauds as a defense: Waterman on Specific Perform. 130; *Walker v. Hill* 21 N. J. Eq. 191; *Small v. Owings* 1 Md. Ch. 363; *Newton v. Swazey* 8 N. H. 9; *Ridgway v. Wharton* 6 H. L. Cas. 238.

E. E. Osborne, for defendant Rood, cited on the Statute

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of Frauds and that forbidding resulting trusts, *Garfield v. Hatmaker* 15 N. Y. 478; *Everett v. Everett* 48 N. Y. 223; *Groesbeck v. Seeley* 13 Mich. 330; *Newton v. Sly* 15 Mich. 396; *Fisher v. Fobes* 22 Mich. 458; *Weare v. Linnell* 29 Mich. 224; *Hooker v. Axford* 33 Mich. 457; the statute prohibiting resulting trusts applies to a joint purchase as well as an entire: *Powell v. Mfg Co.* 3 Mas. 363; *Wray v. Steele* 2 Ves. & B. 389.

CHAMPLIN, J. It appears from the record in this case—

1. That at and prior to January 24, 1882, complainant and defendant Ward had negotiated for the purchase of the lands described in the first paragraph of the bill of complaint, and each furnished one-half of the purchase price as between themselves, and for convenience had caused the title of such land to be conveyed to one William Rowland, who held the legal title for them; and that in equity complainant and Ward each owned the undivided half of such lands.

2. That at this time complainant and defendant Ward had purchased jointly, each paying one-half of the consideration, an undivided three-fourths of certain lands in township forty-eight north, range thirty west, and an undivided one-third of certain lands in township thirty-four north, range forty-six west, and an undivided one fifteenth of certain lands in township forty-three north, range thirty-three west,—all particularly described in the third paragraph of the bill of complaint; that the title of these lands was for convenience taken in the name of defendant Ward, who held them for the joint benefit of himself and complainant.

3. That for three years prior to said 24th day of January, 1882, defendant Ward had been county treasurer of Marquette county, and as such had become a defaulter to the amount of about eighteen thousand dollars.

4. Defendant Rood was a surety for Ward upon his official bond as county treasurer, and, in order to secure his sureties, Ward transferred to Rood all of his property.

5. Among the property so transferred was a quitclaim deed of the land mentioned in the third paragraph of the

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bill executed by Ward to Rood; and Rowland also, at Ward's request, executed a quitclaim deed of the land described in the first paragraph of the bill.

6. At the time of the execution of these deeds Ward informed Rood, before the deeds were signed, that complainant owned an interest in these lands, and objected to signing them for the reason that he could not, at the time of signing the deed, give the descriptions in which complainant was interested, and requested Rood to defer the execution until he could do so, whereupon he was informed by Rood that he was giving merely a quitclaim deed which would transfer his interest in those lands alone which belonged to him; that if other parties had an interest, that could be arranged afterwards; and thereupon the deeds were executed and delivered.

7. Soon afterwards complainant and defendant Ward requested Rood to execute to complainant a quitclaim deed of his, complainant's, interest in said lands, which deed was prepared by complainant, who offered to pay the expense thereof, but Rood declined and refused to do so, or recognize any right or interest of said complainant in such lands.

8. The court below, on the hearing, pronounced a decree directing a conveyance of complainant's interest in the lands, and defendant Rood appeals.

The decree of the circuit court must be affirmed. It would be a palpable fraud upon the rights of complainant to permit defendant Rood to retain the title under the circumstances and assurances made by him to induce the execution of the conveyance, and after obtaining the deeds, to repudiate the understanding upon which he received them. He perfectly understood that the extent of the interest he was obtaining as security by the deeds was what actually belonged to Ward after complainant's undivided interests had been separated out and conveyed to him. If defendant Ward had been able to separate out and specify his own interest in the lands as distinct from complainant's, there is no doubt but it would have been done at the time of the conveyance, and it was in reliance upon defendant Rood's statement that his undivided

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interest only passed by the deed that Ward signed. The subsequent action of Rood is unconscionable, and he cannot be permitted to use the Statute of Frauds as a shield against the performance of the just and equitable duty he assumed when he received the deed under the assurance then given that the interests of other parties could be arranged afterwards.

The decree is affirmed with costs.

The other Justices concurred.

WILLIAM L. WEBBER, EXECUTOR FOR JESSE HOYT v. JOHN RYAN AND MARY ANN RYAN.

Outlawry—Foreclosure—Burden of proof.

1. The fact that a note is outlawed does not prevent the foreclosure of the mortgage which secures it.
2. Where a mortgager is an employee of the mortgagee, and the latter's agent keeps the accounts, and it is understood that moneys coming through him to the mortgager are to be applied on the mortgage, the mortgagee, to entitle himself to a decree on foreclosure, must make a clear case and a full exposition of the accounts, especially if several years have been allowed to pass without attempting to enforce payment, or to secure it except by labor.

Appeal from Tuscola. (Wixson, J.) Apl. 16.—June 11.

FORECLOSURE bill. Complainant appeals. Affirmed.

Tarsney & Weadock for complainant. Defendant in foreclosure has the burden of proving payments which he claims to have made: *Lyon v. McDonald* 51 Mich. 435.

Frank L. Fales and *H. P. Atwood* for defendants.

COOLEY, C. J. The bill in this case is filed to foreclose a mortgage given by defendant John Ryan and Mary Ann, his

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wife, to Jesse Hoyt, to secure the payment of a note of one thousand dollars, with ten per centum interest, dated November 25, 1873, and payable in one year thereafter. The mortgage bore even date with the note. The bill was filed April 13, 1882, and it claimed the whole amount of the note with interest, as unpaid. The defendants answered, insisting that the whole amount of the note had been paid, and the circuit court so found on the evidence. The complainant appealed.

It appears from the evidence that the mortgagee resided in New York, but was a large property owner in the Saginaw valley, and carried on lumbering and other operations there. Mr. William J. Bartow was his general agent in the charge of his property and of these business operations. Ryan was a laboring man, and took jobs of clearing land, building fence, and getting in saw-logs. He had such jobs from Bartow as agent for Hoyt in 1870 and 1871. In 1872 Bartow applied to him to take an unfulfilled contract for lumbering off the hands of one Weaver, who was likely to fail in its fulfillment, and Ryan consented to do so. But he was without much means, and required advancements to enable him to meet the expenses before the contract was fully completed, and the note and mortgage now in suit were given for moneys advanced by Bartow for this purpose. A further sum of eight hundred dollars advanced for the same purpose was secured by a chattel mortgage.

Ryan claims that during the winter of 1872–73 he got out for Hoyt a quantity of logs, which were not sent forward by river, as was intended, the following season, but which he was to be allowed for when they were received, and that he has never been credited for them. It is denied by complainant that there were any such logs not credited, and both parties have taken proofs on the subject. We are of opinion that the preponderance of evidence on this subject is with the defendant, and that Ryan is entitled to credit for the logs as he claims.

In 1874, and for two or three years afterwards, Ryan furnished to Bartow, for the use of a plank-road company of

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which Bartow was manager, a large quantity of oak plank, for which he was not fully paid. Ryan claims to have understood that he was furnishing the plank to Bartow as agent for Hoyt; but this seems not to have been the fact. It is admitted by Bartow, however, that Ryan was to have some part of the money coming to him for the plank applied on one of the mortgages, and it is not surprising that Ryan received the impression he did as to the party who was to account to him for the plank, especially as he was, at the same time, dealing with Bartow as Hoyt's agent, and taking jobs from him in that capacity. The plank-road company is now insolvent, and Ryan apparently has no prospect of payment from that source.

The other jobs taken by Ryan need not be mentioned. He did not keep regular books, and had to rely upon Bartow for the accounts, and there is every reason to believe that Bartow fully understood this. In view of this fact, and of the variety of dealings which had been had with Bartow, as agent and as manager for the plank-road, and especially of the great lapse of time, it was particularly incumbent upon Bartow to make a complete exposition of the accounts in this suit. Remedy upon the note was barred; and though this did not preclude a foreclosure of the mortgage if anything remained unpaid, it fairly charged the complainant, in connection with the other facts, with the duty of showing that, in some way, Ryan had been paid for all the jobs he had done for Hoyt. The price for his services on the several jobs was a legitimate offset to the mortgage, and should be applied unless otherwise satisfied. We do not think that complainant has in this case borne the burden of proof which the circumstances cast upon him, and made the showing which equity required.

Taking into account the long delay, without any attempt to enforce or secure payment unless by the labor, which must necessarily cast some suspicion upon the case now made, (*Lashbrooks v. Hatheway* 52 Mich. 124,) and the admitted fact that Ryan for a large portion of the time has been at work for Hoyt, and that only Bartow was supposed to keep

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full and business-like accounts, we agree with the circuit judge that complainant's case is not satisfactorily made out, and that the bill ought to have been dismissed.

The decree to that effect will therefore be affirmed.

The other Justices concurred.

Mary Schulte v. William P. Holliday.

Injury from servant's negligence—Evidence—Damages.

1. In an action for damages caused by the recklessness of defendant's servant in leaving his horse unhitched, it is proper for the identification of the turn-out to show that the name of defendant's firm appeared on the vehicle.
2. A servant's long-continued and notorious habit of leaving his master's horse unhitched may be shown in an action against the master for damage caused thereby.
3. Where a person sued for damages caused by the recklessness of a driver in his service defends on the ground that the team belonged to a third person and that the driver was in his employment, it is proper to show that defendant and the third person had been in partnership until shortly before the injury.
4. The question whether a servant is acting within the scope of his employment depends upon facts as to which the finding of a jury is conclusive.
5. In an action by a married woman for personal injuries it is proper to include the expense of medical attendance.
6. In an action for injury caused by the conduct of a servant the burden of proof is not on the plaintiff, after he has shown that at the time the injury was done the servant was in the employment of defendant in his regular business, to show farther that he was acting in the course of his employment.

Error to the Superior Court of Detroit. (Chipman, J.) April 23.—June 11.

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CASE. Defendant brings error. Affirmed.

Barbour & Rexford for appellant. The master is not liable for injuries caused by the negligence of his servant while the latter is doing an unauthorized act, beyond the scope of his employment, for his own or another's purposes, although in doing such act he uses the implements or property of the master: *Cavanagh v. Dinsmore* 12 Hun 465; *Quinn v. Power* 17 Hun 102; *Garretzen v. Duenckel* 50 Mo. 104; *Sheridan v. Charlick* 4 Daly 338; *Storey v. Ashton* L. R. 4 Q. B. 475, overruling *Sleath v. Wilson* 9 C. & P. 607; *Mitchell v. Crasweller* 13 C. B. 237; *Stone v. Hills* 45 Conn. 44; *Church v. Mansfield* 20 Conn. 284; *Courtney v. Baker* 37 N. Y. Superior Ct. 249; *Bard v. Yohn* 26 Penn. St. 482: 4 Wait's A. & D. 412; Cooley on Torts, 537, 538, notes; *Campbell v. Providence* 9 R. I. 262; a married woman living with her husband cannot recover the amount of a doctor's bill as part of her damages for an injury: *Berger v. Jacobs* 21 Mich. 215.

Atkinson & Atkinson for appellee.

SHERWOOD, J. This is an action on the case, to recover damages for injuries to plaintiff occasioned by the negligence of the servant of the defendant in allowing his horse to run away in the city of Detroit, and against the wagon of the plaintiff in which she was riding, overturning the same, breaking her arm, and otherwise causing serious personal injuries to her. That the defendant left his horse standing in the street unhitched, at the time the injury occurred, is undisputed, and that he was accustomed to do so. Neither were the injuries claimed to have been received by the plaintiff contested. No question is made upon the pleadings.

The defenses set up were: 1st. That the driver, one Dubois, was not the servant of the defendant; and 2d. He was not acting within the scope of his authority at the time the injury occurred, if he was the defendant's servant. Upon both these points the verdict of the jury was against the defendant, and unless there was something wrong in the rulings of the court upon the trial, or in charging the jury, the judgment should not be disturbed.

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The plaintiff showed, against the objection of defendant's counsel, of immateriality and irrelevancy, that the name of defendant's firm was upon the wagon which the servant used on the occasion of the injury. There was no error in this. It was proper to identify the horse and vehicle used by defendant at the time.

The plaintiff was permitted to prove that Dubois was in the habit of leaving his horse unhitched in the street, and that he was also in the habit of driving the horse to the same place where he left him on the day the injury occurred, and leaving him unhitched while he was taking his meals. We can see no objection to this testimony. The long-continued and notorious habit of the servant in doing his master's business, is, at least, some testimony tending to show knowledge and permission, if not approval, by the master, and as such was competent in this case. It further tended to show him acting within the scope of his employment.

E. P. Zerbe, a witness for plaintiff, testified, in substance, that he worked for defendant and his partner, one Alexander, in Detroit, from March, 1881, until after the accident occurred, as their foreman; that they had a horse and wagon belonging to the firm, and the name was upon the wagon; that they were in partnership, and Dubois was delivering boxes for them the day of the accident; that they quit doing business together as partners about two weeks after the accident; that Holliday told him after this that he was running the factory alone; that Mr. Dubois was delivering boxes under his instructions as foreman of Holliday & Co. when the accident occurred; that nothing was said about their not being in partnership until about two weeks after the accident; that Alexander said Holliday was going to have the business alone, and about a week after that Holliday said he was going to run the shop alone; that during the month of September Holliday brought an order to make boxes, and gave money to pay the hands, and that the books were kept in the name of W. P. Holliday & Co.

Defendant's counsel here moved to strike out all of Zerbe's testimony given to show Holliday's partnership when the acci-

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dent occurred, on the ground that his statements were made as matters of belief and not knowledge. This objection cannot stand. The usual testimony of partnership was given, and inasmuch as it was, upon the trial, sought to be established by defendant that Alexander owned the horse and wagon that did the mischief, and that Dubois was Alexander's servant and not that of the defendant, all this evidence was entirely proper to be submitted to the jury. The partnership of defendant in the business was a material question in the case, and there was no error committed in allowing the testimony complained of upon this point.

Whether Dubois was acting within the proper scope of his employment or not, depended upon the finding by the jury of the existence of certain facts, and these, by the general verdict, were with the plaintiff, and cannot now be disturbed. This disposes of the defendant's fifth assignment of error.

The next error assigned relates to the plaintiff's right to recover for the doctor's bill, and the expenses of her sickness complained of. The defendant claims his liability, if any, was to the husband, and not to the plaintiff. We think it was competent for the wife to recover for the expenses incurred for these items, under the circumstances of this case.

We see no error in the court's refusal to give the defendant's first three requests: (1) That the burden of proof in this case is on the plaintiff to show that the servant, Dubois, was acting within the course of his employment at the time of the accident to plaintiff; (2) That there is no evidence in the case to show that Dubois, the driver, was acting within the course of his employment at the time of the accident to plaintiff, and plaintiff is not entitled to recover damages in this suit; (3) That there is no evidence in the case to show that Dubois, the driver, was the servant of Holliday, the defendant, at the time of the accident to the plaintiff, and plaintiff is not entitled to recover damages in this suit.

There was some testimony to go to the jury on the question referred to in the second and third requests, and we do not think the burden of proof claimed in the first request was

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upon the plaintiff, after having shown the servant in the employment of the defendant in his regular business.

We find no error in the record, and

The judgment must be affirmed.

The other Justices concurred.

William B. Ledyard v. Chester S. Morey.

Lease—Action for rent—Parties—Evidence of lease.

1. In an action for the use and occupation of premises under the lease of a right of way it is no defense that other persons also had a right of way if the right was in neither case exclusive; nor would such other persons be necessary parties to the action.
2. In an action for rent of a right of way over land to which defendant claimed equitable title, it is proper to show that defendant had told one of his own tenants that he had the right to use the premises for passage; and if the purpose of such evidence is merely to show that defendant used the premises and obtained the right to use them from the plaintiff, it is immaterial whether the lease was or was not in writing, and the testimony is not open to the objection that the lease itself is the best evidence.

Error to Kent. (Montgomery, J.) April 23.—June 11.

Assumpsit. Defendant brings error. Affirmed.

E. S. Eggleston for appellant. Tenants in common must join in an action for the recovery of any personal interest growing out of lands occupied by them as tenants in common: *Decker v. Livingston* 15 Johns. 479; *Hill v. Gibbs* 5 Hill 56; non-joinder of tenants in common in a suit may be taken adantage of on the trial: *Hill v. Gibbs* 5 Hill 56.

Norris & Uhl for appellee. Existence of a lease may be shown by the oral admission of the lessee: 1 Greenl. Ev. (12th ed.) §§ 87, 97; *Rayner v. Lee* 20 Mich. 388; the receipt of rent is unnecessary: *Bull v. Sibbs* 8 Term 327; though its payment by another than the occupant is enough to show that the occupancy was under him: *Moffat v. Smith* 4 N. Y. 128; *Dimock v. Van Bergen* 12 Allen 551.

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SHERWOOD, J. This is an action brought by the plaintiff for the use and occupation of certain premises in the city of Grand Rapids. In 1875 the parties owned together the west part of lots nine and ten, fronting on Pearl street. They subsequently divided these lots between them, and Ledyard conveyed to Morey a part of lot eight, lying in the rear of lots nine and ten. After the lots were built on, there remained a strip of ground between their respective parcels, belonging to Mr. Ledyard, about twelve and one-half feet wide, and extending back to the rear end of the buildings of both parties. This strip was the only convenient means of access to two of Morey's stores, and that part of lot eight which Morey had purchased of Ledyard. At the time of the division of the property referred to between the parties, it is claimed, and the testimony tends to show, that Morey agreed to buy of Ledyard one-half of the twelve and one-half feet at two hundred dollars per foot, but the purchase seems not to have been completed. In 1875, after the buildings were erected, Ledyard permitted the strip to be used by Morey and his tenants for passage, Morey to pay therefor $120 per year. The defendant used the same until January 1, 1877. After that date the compensation was reduced, by agreement, to $100 per year, and defendant continued his use of the strip until July 1, 1882, at which time there was due to plaintiff, upon such agreement, as claimed by him, the sum of $300; and for this balance the plaintiff brought this suit.

The defendant claimed that he bought the property for which the rent is claimed for $1200, and paid interest on the purchase price to the amount of $490; that after he had paid interest two years he demanded a deed of the plaintiff, but he could not make title to the property, but wanted to deed the defendant the right of way.

Upon these two theories the testimony in the case was taken and submitted to the circuit judge, who found the facts to be substantially as claimed by plaintiff and as above stated, and that he was entitled to judgment for $300. The court also found that on the 27th day of April, 1874, the

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plaintiff, by a quitclaim deed, gave to W. S. Gunn and M. D. Perkins a right of way over the same property. Also that on the 5th day of January, 1875, the plaintiff made and executed to L. K. Rathbun a quitclaim deed of a right of passage over the leased property. The court further found, as a matter of law, that neither Gunn, Rathbun nor Perkins were necessary parties to the suit; neither did the conveyances to them of the right to use the land for the purpose stated prevent the plaintiff's suit for use of the premises, or the recovery of the promised compensation therefor.

To these conclusions of law counsel for defendant excepted, and upon these he assigns error. We can see no error in these findings of the law. No exclusive right of passage over the land was conveyed to either Gunn, Perkins or Rathbun.

There is nothing in the record showing or tending to show that the defendant did not have the use of the property in accordance with the terms of his agreement with the plaintiff, and the finding of the court is that he did so have the use of the property. The finding also shows $300 due and unpaid to plaintiff from defendant, and unless the findings of fact in the case are based upon improper or inadmissible testimony we cannot disturb the judgment.

In perusing the bill of exceptions but two appear to be really relied upon as showing improper rulings by the court in receiving testimony. They relate to the use of the premises by the express company, which was a tenant in one of Morey's buildings, and as to what Morey said to the company's agent about his right to use the same when he made the lease to the company. The evidence objected to was received by the court to the effect that the company did occupy the building of defendant, and did use the land for passage, and that Morey told the agent, at the time the company rented of him, that the latter had the right to the use of the premises for passage. We think this was proper testimony. It not only tended to show the use of the premises in question by defendant, but that the right to such use was obtained from the plaintiff. The objection to this testimony

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was that it was irrelevant, immaterial and incompetent. It was not subject to the objections made. There was no ground for the objections stated and urged by counsel for defendant, that there was better evidence, the lease being in writing. For the purpose for which the testimony was offered it was immaterial whether it was in writing or not.

We find no error in the record, and

The judgment must be affirmed.

The other Justices concurred.

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William Mulder v. Robert Corlett.

Jurisdiction on appeal from commissioner.

The jurisdiction of the circuit court on the appeal from a circuit court commissioner of a summary proceeding to recover possession of land, is no greater than the commissioner had; and if the title to the land was involved, as it would be if defendant denied the validity of an execution sale under which plaintiff claimed, a motion to dismiss the proceeding should be granted.

Error to Muskegon. (Russell, J.) April 24.—June 11.

Proceedings to recover possession. Defendant brings error. Reversed.

Cook, De Long & Fellows for appellant.

McLaughlin, Delano & Bunker for appellee.

Sherwood, J. This action was a proceeding before a circuit court commissioner, to recover the possession of a quantity of land in the township of Ravenna, in the county of Muskegon. The parcel consisted of defendant's homestead of forty acres, and about twenty acres adjoining. There was no question but that on the 10th day of November, 1880,

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he was the owner in fee of the premises in question. On February 17, 1883, this suit was commenced by the plaintiff against the defendant. The complaint is in the usual form, and no objection is taken thereto, provided the circuit court commissioner had jurisdiction to try the question of title involved in the case, and this is the first question demanding our consideration.

On November 10, 1880, the defendant's wife commenced her suit against him for divorce and permanent alimony on the ground of cruelty and neglect. The bill described the land, and prayed for a sale thereof if necessary to satisfy such decree as complainant might obtain against the defendant; and the court decreed that defendant should pay complainant $1500 alimony, in three equal installments, in thirty, fifty and seventy days thereafter; and contained the further clause that in case of failure to pay either of the installments, those remaining unpaid should all become due, and upon complainant filing affidavit of that fact execution might issue without further order of the court, and the land be sold thereon by the sheriff of the county of Muskegon to satisfy the complainant's claim.

The affidavit of complainant's solicitor was made and filed, declaring the whole amount due, and execution was issued on the 8th day of July, 1881, by the register in chancery for the amount of the decree, directed to the sheriff, to levy upon and sell the premises in question if necessary to satisfy the complainant's decree and costs, and on the same day the levy was made. Soon after the levy was made, defendant gave notice to the sheriff that he claimed the forty acres of the premises upon which his house stood, as his homestead. On the 15th of October, 1881, the sheriff made sale of the property in question,—the homestead part for $1100 and the remainder for $530,—and in January following, and after the sheriff's term of office had expired, he executed to the plaintiff a deed of said parcels. During all these proceedings it appears the defendant had possession of the premises, and claimed the forty acres as his homestead.

The proceedings are brought under subdivision three of

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How. Stat. § 8295, relating to "Summary Proceedings to Recover the Possession of Land." The circuit court commissioner gave judgment for the plaintiff, and, on appeal to the circuit, the plaintiff, under the rulings of the court, again obtained judgment, the court directing the verdict in his favor. It will be seen that, to enable the plaintiff to recover, he must show title in himself to the property, and it was substantially conceded that the defendant was the owner of the fee and in possession at the time suit was brought, unless through the execution sale he was deprived of it and plaintiff obtained it. The defendant denied the validity of the sale. The question of title must therefore be litigated and determined in the plaintiff's favor, in order to entitle him to the judgment he obtained. This cannot be done before a circuit court commissioner, and on appeal to the circuit, the circuit judge had no greater or more extensive jurisdiction than the commissioner. Wells on Jurisdiction 387–389, note; *Bennett v. Robinson* 27 Mich. 30; *Foss v. Van Driele* 47 Mich. 201; *Vos v. Dykema* 26 Mich. 399; *Riggs v. Sterling* 51 Mich. 157; *Winterfield v. Stauss* 24 Wis. 397.

We think the case should have been dismissed when the motion was made to the court for that purpose. The case was before the circuit court under the same limitations and restrictions which governed the commissioner.

There are several other errors well assigned, and which, we think, would have been fatal had the circuit court had jurisdiction to try the title, but it is unnecessary to consider them, as what we have already noticed disposes of the case

The judgment must be reversed and the proceedings dismissed with costs of both courts.

The other Justices concurred.

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CHARLES G. MORAN ET AL. v. PETER LEZOTTE ET AL.

Deed—Construction of descriptive clauses.

1. A description in a deed which gives a part of the boundary as "thence running *to the rear* of the said" land, does not necessarily mean that the granted parcel is bounded by the rear line of the land referred to, but may simply indicate the direction of the boundary, as if the word "towards" were used instead of "to."
2. Every word in a deed must, if possible, be given effect and harmonized with all the rest.
3. Rules of construction are only for reaching the probable intent of the instrument construed, and are necessarily flexible.
4. The statement of quantity in the descriptive clause of a deed may properly be taken as controlling where the circumstances show that it is the particular least likely to be wrong, and where the description is ambiguous or indefinite in respect to fixed lines and monuments.
5. Negotiations for a sale of land, including a bond for its transfer, are merged in the deed thereof; and while the bond cannot contradict the deed it is proper to resort to it for an explanation of ambiguities therein.
6. In ejectment for land which defendant claims was not included in the deed under which plaintiff's title is asserted, the plaintiff, if the deed is ambiguous, can show such conjoint acts of the parties thereto as tend to show their understanding of the location of the boundary and that stakes placed by them were so placed to define it.
7. Declarations by an original grantee before parting with his title may be shown in an action of ejectment brought by parties claiming under him, if adverse to the claims made by them.
8. Plaintiff in ejectment is entitled to a judgment for so much of the land as he shows title to, even though a larger quantity is in dispute.

Error to Macomb. (Stevens, J.) April 24.—June 11.

EJECTMENT. Plaintiffs bring error. Reversed.

Atkinson & Atkinson for appellants. Every part of a deed must be given effect, if possible: 3 Washb. R. P. 628; *Hibbard v. Hurlburt* 10 Ver. 178; *Purkiss v. Benson* 28 Mich. 538; a statement of quantity in a deed is not affected by

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the words "more or less:" *Holland v. Rea* 48 Mich. 223; *Cabot v. Winsor* 1 Allen 550; *Morris v. Levison* L. R. 1 C. P. Div. 157: Benj. Sales 569; *Blaney v. Rice* 20 Pick. 64; the line with reference to which a deed is made as an established line will be so regarded in the construction of the deed: *Flynn v. Glenny* 51 Mich. 580; *Joyce v. Williams* 26 Mich. 332; *Diehl v. Zanger* 39 Mich. 603; *Chapman v. Crooks* 41 Mich. 597; *Bower v. Earl* 18 Mich. 375; *Baldwin v. Brown* 16 N. Y. 361; *Twogood v. Hoyt* 42 Mich. 610; *Fahey v. Marsh* 40 Mich. 236; *Simpson v. L. P. M. & S. Co.* 17 Fed. Rep. 124; *Nickerson v. A. T. & S. F. R. R. Co.* id. 409; *Gregory v. Knight* 50 Mich. 62; *Stewart v. Carleton* 31 Mich. 272; *Smith v. Hamilton* 20 Mich. 438; *Dupont v. Starring* 42 Mich. 493; *Sparrow v. Hovey* 44 Mich. 64; *Davis v. Bowmar* 55 Miss. 742.

Crocker & Hutchins for appellee. The meaning of the words of an instrument determines its construction: 1 Greenl. Ev. § 277; 2 Washb. R. P * 736; *Adair v. Adair* 5 Mich. 205; *Child v. Wells* 13 Pick. 121; *Crosier v. Acer* 7 Paige 141; *Austin v. Sawyer* 9 Cow. 49; *McGuire v. Stevens* 9 Am. L. Reg. (N. S.) 484; the statement in a deed of the quantity of land conveyed is matter of description merely, and will be rejected if inconsistent with fixed monuments: 3 Washb. R. P. 347; 4 Kent's Com. * 466; *Gilman v. Riopelle* 18 Mich. 146; *Butterfield v. Cooper* 6 Cow. 481; *Mann v. Pearson* 2 Johns. 37; *Jackson v. Defendorf* 1 Cai. 493; *Jackson v. McConnell* 19 Wend. 175; *Van Wyck v. Wright* 18 Wend. 157; statements made by the parties to a deed when giving it are merged in the deed and cannot be shown: *Martin v. Hamlin* 18 Mich. 354; *Jones v. Phelps* 5 Mich. 218; *Sutherland v. Crane* Walk. Ch. 523; *Cline v. Hubbard* 31 Mich. 238; their acts and declarations are not admissible to show their interpretation of it: *Locke v. Whiting* 10 Pick. 278; *Allen v. Kingsbury* 16 Pick. 235; *Giles v. Comstock* 4 N. Y. 271; *Drew v. Swift* 46 N. Y. 204.

Cooley, C. J. In September, 1845, Gazette Trombley executed and delivered to Pierre Joseph Bonay a bond, in which, after reciting that "whereas the said Gazette Trombley has this day sold the above-named Pierre Joseph Bonay forty-three French arpents of land, situated and described as follows: Bounded in front on Milk river one and a half French arpents in front; bounded on the north side by lands

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owned by Joseph Campau; on the south and rear by lands owned by Gazette Trombley,—this land being part and parcel of a tract of land containing five hundred and thirty acres, granted to the said Gazette Trombley by the President of the U. S. A., on the first day of June, 1811; and, whereas, there is due me," on the purchase money, seventy-nine dollars and fifty cents,—the obligor undertook to convey the same to said Bonay when the sum of money mentioned should be paid. A deed was given in performance of this obligation, May 24, 1848, and the land was described therein as "bounded in front on Milk river, commencing at the corner in front by land owned by Joseph Campau; thence following the river up stream one and a half arpents; thence running to the rear of the said Gazette Trombley land the same width,—containing forty-three French acres, be the same more or less; being part and parcel of a tract of land, containing five hundred and thirty acres, granted to the said Gazette Trombley by the President of the United States on the first day of June, 1811." The difference between the descriptions in the bond and in the deed will be obvious at a glance; it consists in the main in this: that in the deed the parcel of land one and a half arpents in width is bounded in the rear "by lands owned by Gazette Trombley," while in the deed it is made to run "to the rear of the said Gazette Trombley land." By the "Gazette Trombley land" here it is assumed on both sides that the tract of 530 acres, granted to Trombley in 1811, was intended. Trombley, it appears, had obtained a subsequent grant, bounded on this in the rear.

The present suit grows out of the fact that a parcel of land one and a half arpents in width, on Milk river, and extending the same width to the rear line of the grant of 1811, will contain sixty-five instead of forty-three French acres; and the question now in controversy is whether the deed to Bonay is to be construed as conveying the sixty-five acres, or whether it is to be restricted to forty-three acres. The controversy, therefore, concerns the rear twenty-two acres of the strip of land one and a half arpents wide on Milk river, and extending the same width to the rear line of the grant of 1811. The

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defendant, who deduces title through the Bonay deed, is in possession. He claims that the deed gives the rear line of the grant of 1811 as one of the boundaries of the tract conveyed, and he relies upon the familiar rule of construction that quantity must yield to fixed lines and monuments when they conflict, as entitling him to hold the land in dispute. The plaintiffs, who hold conveyances from the heirs of Gazette Trombley, dispute this construction of the Bonay deed, and contend that it conveys forty-three acres, and no more. And on the trial they offered evidence of acts and declarations of Trombley and Bonay, made after the execution of the deed, tending to show not only that they understood the deed to embrace forty-three acres only, but that they made practical location of the rear line of the parcel in accordance with that understanding. The circuit judge excluded evidence of declarations, and adopted the construction of the Bonay deed which was contended for by the defendant. This construction necessitated a verdict in the defendant's favor.

The view which the circuit judge took of the deed assumed that there was an error in the description; but that, as the front and rear lines, as well as the width of the parcel, were definitely fixed, the error must necessarily be in the specification of quantity, and consequently, that such specification must be rejected. With that done, all is plain and certain, and the conclusion of the circuit judge is a necessary one.

But the first question in the case is whether any error exists. We are not lightly to assume this, and all presumptions are against it. It is to be supposed that the parties have intelligently, as well as purposely and without error, made use of every phrase and every word which their deed contains; and in applying the deed to the subject-matter, the court must proceed upon this assumption until it is clearly made to appear that a mistake exists. Every word is to have effect, and to be harmonized with all the rest if that shall be found possible. *Shultz v. Young* 3 Ired. Law 385: s. c. 40 Am. Dec. 413; *Thatcher v. St. Andrew's Church* 37 Mich. 264; *Moore v. Griffin* 22 Me. 350; *Herrick v. Hopkins* 23 Me. 217; *Watters v. Bredin* 70 Penn. St. 235; *Richardson*

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v. Palmer 38 N. H. 212; *Miller v. Bryan* 86 N. C. 167; *Churchill v. Reamer* 8 Bush 256; *Alton v. Ill. Transp. Co.* 12 Ill. 38: s. c. 52 Am. Dec. 479.

The difficulty here is in harmonizing the part of the description which extends the tract conveyed "to the rear of the said Gazette Trombley land," with the part which specifies the quantity. If the rear line of the tract is to be the rear boundary of the parcel conveyed, this is impossible. The question, then, is whether effect can be given to every part of the description without making the rear line of the tract the rear line of the parcel conveyed. And the solution of this question must depend upon the meaning to be imputed to the words "to the rear," as here made use of.

The word "to," as commonly made use of, conveys to the mind the idea of movement towards and actually reaching a specified point or object; and the meaning is not satisfied unless the point or object is actually attained. But this use is not universal; the word is sometimes employed in a sense that embraces a part of this idea only, or simply as a word of direction; as we say to the north or to the south, when we mean in those directions merely; or as in the army an officer might command a wounded man, or any impedimenta, to be taken to the rear. In many cases the word has a meaning nearly synonymous with "towards;" and if in the Bonay deed it has been used in that sense, all the parts of the description can be perfectly harmonized.

Now, there would have been nothing strange in the parties making use of the word in that sense. A strip of land was to be conveyed, parcel of a large tract; the parties had a natural boundary for the front, and they proposed to extend it from this front boundary for a specified width "to the rear" of the tract, to embrace forty-three acres. When it is ascertained that to extend the parcel to the rear line of the tract is to make it embrace fifty per cent. more land than the quantity mentioned, it seems highly probable that, in the language made use of, they intended only an extension of the side lines in the direction of the rear, but not necessarily to the rear line, unless it should be found necessary to go to that

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line in order to include the specified quantity. See, for its analogy, *Massey v. Belisle* 2 Ired. N. C. L. 170.

But if this supposition be inadmissible, and if it be conceded that the quantity specified and the other particulars given cannot be harmonized, the difficulty in construction is not necessarily solved. It is, no doubt, generally true that where definite lines or definite monuments are given in a conveyance, and the quantity mentioned conflicts with these, the lines or monuments must control. But there is no inflexible rule of law to this effect; nor indeed would such a rule be consistent with the main purpose for which rules of construction are established. The only purpose of rules of construction is to enable us to reach the probable intent of the parties, in order that we may give it effect; and unless they are somewhat flexible, they would, in many cases, defeat the actual intent, even when upon the face of the instrument it was obvious what the intent was. The errors in deeds are infinite in variety and form; and any one case of mistake may present considerations a little different from any other. The most general rule of all, perhaps, is that in case of conflicting particulars in a description, that particular in respect to which there is the least probability of error should control: *Gates v. Lewis* 7 Vt. 511; *Abbott v. Abbott* 53 Me. 356; *Piercy v. Crandall* 34 Cal. 334; *Fulwood v. Graham* 1 Rich. 491; and this is reasonable, because it is most likely to effectuate the actual intent. In general, fixed lines and monuments are allowed to control quantity, for the reason that these, being known and open to the observation of the senses, are more likely to have been noted by the parties in the course of their negotiations, and fixed upon in their minds as the important particulars in their conveyance, than the quantity which may or may not have been accurately determined, and often is not specially made prominent. *Powell v. Clark* 5 Mass. 355; *Doe v. Porter* 3 Ark. 18: s. c. 36 Am. Dec. 448; *Gilman v. Riopelle* 18 Mich. 145; *Petts v. Gaw* 15 Penn. St. 218; *Fuller v. Carr* 33 N. J. L. 157; *Nichols v. Turney* 15 Conn. 101; *Heaton v. Hodges* 14 Me. 66: s. c. 30 Am. Dec. 731, and note, 741.

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But cases sometimes arise in which in the deed itself it is made apparent that quantity was more prominent in the minds of the parties than any other single particular which is given; and in such a case the purpose in construction, and the general rule that the particulars shall be allowed to control in respect to which there is least probability of error, would both be disregarded if quantity were to be subordinated in construction to something else. Such a case, apparently, we have here.

This deed, as has been said, was given in satisfaction of a previous bond. In the description as given in the bond no ambiguity or error appears; the land to be conveyed is simply forty-three French arpents, with a front on Milk river of one and a half arpents, and bounded on the rear by Trombley's land. Manifestly, in this bond, the quantity specified limits the extension of the lines to the rear: they are to go back far enough, and only far enough, to include the quantity specified. If the same description had been carried into the deed, it would be plain that defendant could have no claim to the land in dispute; for apparently Bonay, through whom he claims, never bought it. But the deed merged the previous negotiations of the parties: *Howes v. Barker* 3 Johns. 506; *Kerr v. Calvit* Walk. (Miss.) 115: s. c. 12 Am. Dec. 537: *Hunt v. Amidon* 4 Hill 345: s. c. 40 Am. Dec. 283; *Wells v. Jackson &c. Co.* 47 N. H. 235; *Vanderkarr v. Thompson* 19 Mich. 82; and it is by the deed that parties claiming under the grantee named in it must abide now. But the bond may assist in explaining an ambiguity which is disclosed in the deed; it may lend a probability to the case of one party or the other, as his case would appear on the face of the deed were that instrument considered independently; it may explain the deed, and enable us to determine what is erroneous in it, though it cannot be allowed to overrule it. And if the bond and the deed are considered together, it would be very clear that only forty-three acres were sold, and only forty-three were intended to be conveyed.

But looking at the deed alone, there would be much reason for the belief that quantity rather than the rear line of

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the tract was the important particular in mind, as that which should determine the rear boundary of the parcel which the one party was conveying and the other receiving. The land at the time was forest: it is not shown that the rear line of the tract was marked out and indicated by monuments; the land sold was of a defined width, and was to extend back into the woods, and contain a specified number of acres. The conclusion would not be an unnatural one that the quantity was in the minds of the parties as that which should limit the extent of the conveyance, rather than some line in the grantor's woods which was not a line of boundary between himself and any other proprietor, and, for any information we have in this record, may never have been run out or definitely located. It is not likely that the case often arises when quantity should be given controlling effect, but that it may be and must be in some cases may be seen in *Tuxbury v. French* 41 Mich. 7, and 44 Mich. 100; *Baldwin v. Brown* 16 N. Y. 359; *Higinbotham v. Stoddard* 72 N. Y. 94; *Nichols v. Turney* 15 Conn. 101; *Slater v. Rawson* 1 Met. 450; *Morse v. Rogers* 118 Mass. 572; *Winans v. Cheney* 55 Cal. 567; *Herrick v. Sixby* L. R. 1 P. C. 436.

But every such case must be decided upon its specific facts; what we are to do is to ascertain and give effect to the intent, if possible. *Jones v. Pashby* 48 Mich. 634; *Bell v. Sawyer* 32 N. H. 72; *Davis v. Rainsford* 17 Mass. 207. When we are satisfied which is the incorrect particular in the description we must reject it. *White v. Luning* 93 U. S. 514; *Anderson v. Baughman* 7 Mich. 69; *Wilt v. Cutler* 38 Mich. 189. The repugnancy in this case, if there was any, was between quantity very clearly defined, and a line in the woods not shown to have been seen or located, and for which, as a boundary, no special reason appears. As between these the bond tends very strongly to show, if it does not conclusively establish, that the quantity specified should control. And the plaintiffs should have been allowed to show any acts of the parties done conjointly upon the land itself, tending to show their understanding of the location of the rear line of the parcel conveyed, and especially [that] any stakes stuck

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by them on a survey or measurement of the side lines of the land conveyed were stuck to indicate boundary, and also the declarations of Bonay, made previous to the time he parted with his title, which were adverse to the claim now set up under him. *Cook v. Knowles* 38 Mich. 316; *Jackson v. Davis* 5 Cow. 123; *Hewlett v. Cock* 7 Wend. 371; *Nichols v. Turney* 15 Conn. 101; *Shook v. Pate* 50 Ala. 91; *Smith v. Powers* 15 N. H. 546; *Morrill v. Foster* 33 N. H. 379; *Smith v. Forrest* 49 N. H. 230; *Wood v. Willard* 37 Vt. 377; *Powers v. Silsby* 41 Vt. 288; *Treat v. Strickland* 24 Me. 239.

It was stated on the argument, as a reason why the plaintiffs could not recover in this case, that on the trial, on their own theory of the case, they gave evidence of title to only a small part of the land in dispute. But this is immaterial now. If they established a title to any part of the land claimed, they would be entitled to recover it.

A new trial must be ordered.

The other Justices concurred.

John G. Patterson v. The Wabash, St. Louis & Pacific Railway Company.

Carriers of passengers—Injury to passengers from negligent use of track by lessees thereof other than the carrier—Depositions.

1. One who is injured by the wrongful or negligent act of several persons can sue them jointly or severally as he pleases.

2. The maxim *Sic utere tuo alienum non ladas* applies to a railway company that has a right of passage over the track of another, and binds it so to use its right as not by negligence to injure others having like rights.

3. A railway passenger traveling over a leased track has no contract relations with any other lessee of the track than the company which carries him; and if he is injured in consequence of the negligence

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of some other lessee in its use of the track his only remedy is by an action in tort for the latter's breach of its duty to so use it as not to injure him.

4. Depositions, in Michigan, have no validity unless the terms of the statute under which they are taken (How. Stat. § 7461) are substantially followed, or expressly waived; and under the implications of the statute and the uniform practice the name of the witness to be examined must be correctly given in the notice that the deposition will be taken. The examination of James Horan is not authorized by a notice that the deposition of Patrick Horan will be taken; and James Horan's deposition would be inadmissible.

5. The facts making it necessary to take a deposition are not required by statute to be set forth in an affidavit served upon the adverse party; it is enough if they are given in the notice to him that such deposition will be taken. But before a deposition can be put in evidence it must be shown to the court that some one of the statutory reasons exists for taking it; and the affidavit would be prima facie proof thereof, where the practice is to serve it.

6. A brakeman's admission that he caused a railway accident, is inadmissible as res gestæ in an action arising therefrom against the company by which he is employed, if his statement was not made in the execution of his duty or while the act to which it referred was in progress; nor can it bind the company as the admission of an agent, if it does not appear that the act done was in the line of his duty.

7. After a railway accident caused by a misplaced switch a person purporting to be a brakeman declared that he had caused it and had opened the switch. *Held*, that evidence of this declaration would be no better than hearsay as to the fact about the switch.

Error to Wayne. (Chambers, J.) April 24.—June 11.

Case. Defendant brings error. Reversed.

Alfred Russell for appellant. An agent's declarations are not evidence against his principal unless made while engaged in the latter's business and as part of the facts: *Mich. Cent. R. R. v. Coleman* 28 Mich. 446; *Barker v. Binninger* 14 N. Y. 270; *Luby v. H. R. R. R.* 17 N. Y. 131; *Sisson v. C. & T. R.* 14 Mich. 489; *M. C. R. v. Gougar* 55 Ill. 503; *C. C. &c. Co. v. Wilson* 26 Ohio 81, 85; *M. C. R. v. Carrow* 73 Ill. 348; *C. B. & Q. R. R. Co. v. Riddle* 60 Ill. 534; *Whitaker v. Eighth Ave. R. R. Co.* 51 N. Y. 295, reversing 5 Rob. 650; *C. & N. W. R. R. Co. v. Fillmore* 57 Ill. 265; *Penn. R. R. Co. v. Books* 57 Penn. St. 339; *Bellefontaine R. R. Co. v. Hunter* 33 Ind. 335; *Agassiz v. London Tram-*

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way Co. Fish. Dig. (1873) 246; a servant is alone answerable for a wanton violation of law though done while he was occupied with his employer's business: *Moore v. Sanborne* 2 Mich. 519, 529; *M'Manus v. Crickett* 1 East 106; *Lyons v. Martin* 8 Ad. & El. 512; *Croft v. Alison* 4 B. & Ald. 590: Angell & Ames on Corp. § 388; *Crocker v. New London Co.* 24 Conn. 249; *Selma Co. v. Webb* 49 Ala. 240; *Wright v. Wilcox* 19 Wend. 343; *Vanderbilt v. R. T. Co.* 2 N. Y. 479; *Isaacs v. Third Ave. R. R.* 47 N. Y. 122; *Rounds v. D. L. & W. R. Co.* 64 N. Y. 129; *Hibbard v. N. Y. & E.* 15 N. Y. 455; *Thames S. B. Co. v. H. R. R.* 24 Conn. 40; *Mali v. Lord* 39 N. Y. 381; *U. S. v. City Bank* 21 How. 356; it is for the court and not the jury to say whether the act was willful and not binding the defendant: *Thrings v. C. P. R. Co.* 7 Rob. 616; *Roth v. B. & S. R.* 34 N. Y. 548, 553; *Mackay v. N. Y. C.* 27 Barb. 528; *Calkins v. Barger* 44 id. 424; *Gonzales v. N. Y. & H. Rd.* 38 N. Y. 440; the main purpose of the employee to serve his employer has no tendency to bring his act within the course of his employment; thus: where a female servant having authority to light fires in a house, but not to clean chimneys, lighted a fire for the sole purpose of cleaning a chimney, *held*, that her employer was not liable for an injury caused by her negligence in lighting the fire: *Mackenzie v. McLeod* 10 Bing. 385; where a brakeman forced a trespasser from a freight car in motion and caused him to fall through a bridge the company was held not liable: *Marion v. C. R. I. & P.* 59 Iowa 428, 430; so where a brakeman drove off a trespasser from a train and caused him to slip and fall: *Towanda v. Heeman* 86 Penn. St. 418; a servant has no implied authority to do acts outside the kind of service for which he is employed: *Robertson v. N. Y. & E. Rd.* 22 Barb. 91; *Snyder v. H. & St. J.* 60 Mo. 413; *Hoar v. M. Cent. Rd.* 70 Me. 65; *Flower v. Penn. Co.* 69 Penn. St. 210; *L. M. Rd. Co. v. Wetmore* 19 Ohio St. 110; *Allen v. L. & S. W. Ry.* L. R. 6 Q. B. 65; *Walker v. S. E. Co.* L. R. 5 C. P. 640; *Howe v. Newmarch* 12 Allen 49; *DeCamp v. M. & M.* 12 Iowa 348; *E. & C. R. v. Baum* 26 Ind. 70; *I. C. R. v. Downey* 18 Ill. 259; *Pittsburg A. & M. Co. v. Donahue* 70 Penn. St. 109; *N. O. R. R. v. Harrison* 48 Miss. 112; *Glover v. L. & N. W.* 5 Exch. 66; a passenger who has received an injury upon a railroad is entitled to recover against the company with which he contracts, and not against its lessor or lessee even though the injury was caused by the latter's negligence: Pierce on Railroads 283; *Ill. Cent. R. R. v. Barron* 5 Wal. 90; *McElroy v. Nashua*

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R. R. 4 Cush. 400; *Murch v. Concord R. R.* 29 N. H. 9; *Winterbottom v. Wright* 10 M. & W. 109; *Parker v. R. & S. R. R.* 16 Barb. 315.

Isaac Marston, for appellee, cited as to whether statements made immediately after an injury by the injured individual were res gestæ, *Lambert v. People* 29 Mich. 71; *Mabley v. Kittleberger* 37 Mich. 360; *People v. Marble* 38 Mich. 123; *Cleveland v. Newsom* 45 Mich. 62; *People v. Simpson* 48 Mich. 479; *Com. v. M'Pike* 3 Cush. 181.

CHAMPLIN, J. Plaintiff brought suit against defendant, and alleged in his declaration that "on or about the 27th day of March, 1883, the plaintiff was proceeding on a train of cars running from Toledo, Ohio, to Columbus, Ohio, on the Columbus, Hocking Valley & Toledo Railway, and was a regular passenger upon said train, and said train had reached a point at East Toledo, where, from the main line on which it was proceeding, there branched off a side line running up the east branch of the Maumee river, upon which branch line the said defendant was moving a train of cars, and it was the duty of the said defendant to stop its said train at said point, and to await orders, and not to open the switch there until it had received the order, nor until the said train had passed on which the said plaintiff was being carried; and it was further its duty to have a safe and convenient switch at said point, and to have a switchman there, so that said switch would not be opened while said train was passing on which this plaintiff was being carried, and to have such a switch that, if opened, those running said train could perceive it and arrest said train in time; yet the said defendant so negligently and unskillfully conducted themselves in and about the management of their said train on the said side track and switch, that they had at that point a switch of an old, disused and dangerous pattern, and so constructed that the approaching train could not readily perceive when the same was opened; that they had no regular attendant upon said switch; that they did not arrest their said train and await for orders before entering upon the track which was being used by the said train on which said plaintiff was

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being carried, nor wait until the said train had passed, but negligently and carelessly, and without fault on the part of this plaintiff, opened the said switch and prepared to carry their train from said branch track unto the track over which plaintiff was approaching, and then and there caused plaintiff's train to leave the track on which it was running and enter on said branch or side track, and precipitated the same upon the train of the said defendant, whereby the said trains were brought together with great force and violence, and the said plaintiff" received the injury complained of.

It appeared in evidence, on the trial of the cause, that on the 25th day of March, 1883, the plaintiff bought a ticket at Toledo, Ohio, for a passage over the Columbus, Hocking Valley & Toledo Railway Company, from Toledo to Columbus, and entered the train about five o'clock in the morning, which started at that time for Columbus. It appeared from other testimony in the case that the track upon which the car in which the plaintiff was being conveyed ran, was owned by the Pennsylvania Railway Company, and that the Columbus, Hocking Valley & Toledo Railway Company was operated by the Pennsylvania Company for five miles out of Toledo, and that at East Toledo, and within the corporate limits of the city of Toledo, and about one mile east of the place from which the coach containing the plaintiff started, there was a branch track and a switch at the junction of the two tracks, and that the branch track and the switch, as well as the main track, were the property of the Pennsylvania Company; that the Pennsylvania Company maintained the switch, and had an employee whose duty it was to place lights upon it at night, and remove them in the morning; that when said switch was closed a white light was shown up and down the main track each way, and that when it was opened two red lights were caused to be shown up and down the main track each way by the act of opening. It also appeared that at the junction of the branch and main tracks there was a telegraph office owned by the Pennsylvania Company, and in it a telegraph operator who was the servant of the Pennsylvania Company, and whose duty it was to see

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that said light was kept burning at night. It further appeared that the defendant company, by arrangement with the Pennsylvania Company, had the right to run its freight trains over the said branch track upon the main track at said switch, and thence over the main line, a distance of about one mile from East Toledo, into the Pennsylvania yards at Toledo, upon payment of a toll of one dollar per loaded car.

It appeared that the train in which the plaintiff was conveyed left Toledo while it was yet dark, and on the main track, and that the defendant's freight train was waiting on the branch track, and that the conductor of said freight train, having a key to the said switch in his pocket, which key had been furnished him by the Pennsylvania Company, was inside the telegraph operator's office waiting to receive orders to enter Toledo; that the custom was for the train desiring to use said switch to pass upon the main track and to open said switch, and that by the rules and practice of the defendant company the brakemen of the freight train had no authority to open said switch until directed so to do by the conductor of the freight train, and until furnished by him with the key to the switch, but the brakeman did sometimes open the switch without order when it was found unlocked. It appeared that the engine near the train in which the plaintiff was conveyed was proceeding at the rate of from 15 to 18 miles an hour, and that as he came near the switch, about six minutes after leaving Toledo, he saw that there was no light on the switch, and he also saw the freight train of the defendant and the headlight of the engine of said freight train standing still upon the branch track.

Certain rules of the Pennsylvania Company were put in evidence, from which the defendant claimed that it was the duty of said engineer to have halted until he could ascertain with certainty whether or not the switch was open, there being no light upon it; that said engineer, however, did not halt, and the switch being open, the train conveying the plaintiff passed off the main track and upon the branch track, and collided with the defendant's freight train standing still upon said branch track. The defendant also put in evidence

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rules of the Pennsylvania Company in regard to lights and speed. The copies of the rules read in evidence are given in the margin.[1]

The engineer of the plaintiff's train, on cross-examination, testified as follows:

Question. If there had been a light there to indicate that the switch was open, the accident would not have occurred, would it?

Answer. No, I don't think the collision would have occurred.

Q. If you had come to a dead stop and stood until you had found out how the switch was, there would have been no collision?

A. There would not be apt to be a collision if I had stood still, but I supposed the switch was right.

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[1] The rules referred to are as follows:

"Where any train does not stop at any point where another train is to be met or passed, the speed of the former must be reduced in passing switches to ten miles per hour, and extra watchfulness must be used to see that all is safe. If not absolutely sure the switches are right and everything safe, a complete stop must be made. When any train, whether passenger, freight or extra, is on a siding for a passenger train to meet or pass them after dark, a light must be shown if practicable, at each main track switch, giving the proper signal that all is right. In any case the light must be shown at the switch in the direction from which the passenger train is approaching, and in such case special effort must be made to make sure that all is safe at all main track switches.

"None but properly authorized employes of the company shall be permitted to attend switches. Those in charge of trains must give men who are attending switches ample time to throw and fasten the same properly, and must never attempt to use said switches without proper signals to do so from men attending them. If necessary, trains must absolutely stop and wait for such signals.

"The absence of proper signals at switches or crossings where usually shown, indicates possible danger and requires engine-men to halt and ascertain that all is right.

"The absolute general rule for all switches when not in actual use, is that they must be set for the main track and locked.

"They must not rely upon air-brakes in approaching railroad crossings, or meeting points where there is a possibility of striking other trains or other specially dangerous points, but must reduce speed and approach such points under full control.

"They will approach stations, switches and road crossings watchfully, and strictly observe the rules relative to signals.

"Engine-men are required to observe the position of all switches, and if there be levers, targets, or lights, to see that they indicate that switches are properly adjusted. They must know, so far as it is possible for them to do so, that switches are right before attempting to pass or use them. If wrong, the engine or train must, if possible, be stopped at once.

"The position of targets at night will be shown by two red lights."

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It further appeared that the switch was allowed to remain unlocked nearly half the time; that the engineer above mentioned, about forty minutes before the collision, had backed his engine upon the main track and passed this switch in going into Toledo to make up his train in the Pennsylvania yard, and that the switch was closed then; that the switch was called a Wharton switch, and that an engine passing over it into Toledo would not, if the switch were open, leave the track, although an engine passing out of Toledo would, if the switch were open, leave the track and pass upon the branch track.

The first question I shall consider is whether the evidence discloses such a state of facts as would render the defendant liable, assuming that it was through the negligence of one of its brakemen that the collision occurred. It is unnecessary to decide whether, under the testimony in this case, the plaintiff could have maintained an action against the Columbus, Hocking Valley & Toledo Railway Company, founded on his contract relations with that company, or, waiving that, he could have maintained an action on the case against such company, based on its negligence in so running its train in disregard of the rules governing it, for the safe conveyance of its passengers, as to precipitate its train against the train of defendant, whereby he was injured; or whether he could have brought his action against the Pennsylvania Railway Company, founded on its duty to keep its railroad and switches in good and safe condition for the transportation of passengers over its road, and its negligent breach thereof. In most cases of tort the plaintiff has a choice of remedies, and where there is more than one party guilty of the wrongful or negligent act which caused the injury, he has the right to proceed against them jointly or severally, as he may choose. There existed no contract relations between plaintiff and defendant, and the only foundation for a right of action against it must rest upon some breach of duty which defendant owed to plaintiff. The defendant, having a right to use the track of the Pennsylvania Railway Company to pass its trains from the branch track to Toledo, undoubtedly owed a duty to other

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parties having a like right of passage, to so use it as not to cause injury to others through the negligence of defendant. The maxim *Sic utere tuo alienum non lædas* applies to such a case; and if the defendant did, by its negligent act, open the switch and thus cause the collision by which the plaintiff was injured, defendant must respond in damages.

The court below charged the jury that he would submit to them the real question, which, in the judgment of the court, was at issue: Whether the employees of the defendant, engaged within the scope of their duty, opened or left open the switch negligently by which the accident occurred, and if the jury should so find, then the plaintiff would be entitled to a recovery. The jury, having found a verdict for the plaintiff, must have found that the employees of defendant, acting within the scope of their duty, negligently opened, or left open, the switch, and unless such fact was established by testimony that ought to have been excluded from the consideration of the jury, their verdict must stand.

The deposition of James Horan was received in evidence against the defendant's objection, viz.: *first*, because the notice does not state under what statute the deposition is taken, nor does the magistrate return what statute he proceeds under; *second*, because no affidavit was filed and served upon the defendant, showing the circumstances and facts required by the statute for the taking of the deposition; *third*, because the notice was to take the testimony of Patrick Horan, and the testimony of James Horan was taken instead, and the objection was entered in season before the deposition of James Horan was reduced to writing, the defendant having appeared specially to take the objection, and not having cross-examined; *fourth*, because the deposition was not filed until about three months after it was taken, as appears from the entry of the clerk on the back; and *fifth*, because no notice of the filing of the deposition was given to defendant, and the defendant was authorized to believe the deposition had been abandoned.

The deposition, notice of taking, proof of service, and

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officer's return, are annexed to the record, and make a part thereof. The notice served (omitting the title of the court and cause) reads as follows:

"Please to take notice that on Friday next, the 21st day of September, 1883, at 11 o'clock in the forenoon, Patrick Horan will be examined as a witness on the part of the plaintiff in this cause, before Patrick McKernan, Esq., circuit court commissioner for the county of Washtenaw, at his office in the city of Ann Arbor, in said county, at which time and place you are at liberty to appear before the said commissioner and put such interrogatories to the said witness as you may think fit.

ATKINSON & ATKINSON, Pl'ffs Attys.

To Alfred Russell, Esq., Def't's Atty."

Proof by affidavit of service of a true copy on the 15th day of September, 1883, is annexed to the notice. It will be observed that the notice gives no place of residence of the witness to be examined, and states no cause for taking thereof. In the caption of the depositions the officer states that they are taken "pursuant to the notice hereunto annexed, and for the reasons therein stated." The law (How. Stat. § 7468) requires the person taking the deposition to annex thereto a certificate of the time and manner of taking it, the person at whose request and the cause or suit for which it was taken, and the reason for taking it, &c. The certificate annexed to the deposition complies with this section of the statute, with the exception that it does not state the reason for taking it. Depositions taken under this statute can have no validity unless they comply substantially with the provisions enacted by the Legislature; and no departure can be allowed from the requirements which the Legislature have seen fit to impose. *Campau v. Dewey* 9 Mich. 381; *Wattles v. Moss* 46 Mich. 52. How. Stat. § 7460 provides that when a witness whose testimony is required in any civil cause pending in this State shall live more than thirty miles from the place of trial, or shall be about to go out of the State and not to return in time for the trial, or is so sick, infirm or aged as to make it probable that he will not be

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able to attend the trial, his deposition may be taken in the manner thereinafter provided. The three following sections provide for the notice to be given, by whom, and the time and manner of service. Although the statute does not in express words declare that the name of the witness proposed to be examined shall be given in the notice, yet it is clearly implied by its terms that the name of the witness shall be given in order to apprise the adverse party who it is he proposes to examine, as well as the time and place where he will be examined; and such has ever been the uniform practice in this State, whenever the depositions of witnesses are taken, unless by express stipulation waiving such requirement. The notice given to examine Patrick Horan did not authorize the examination of James Horan, and the deposition ought to have been excluded on the strength of this objection alone. The first, fourth and fifth objections are untenable. The third was good. As to the second, the statute does not require an affidavit to be served upon the defendants showing the circumstances and facts required by the statute for the taking of the depositions. It is sufficient that the reasons required by the statute appear in the notice; but before such depositions can be read in evidence, the party producing them must make it appear satisfactorily to the court, by prima facie proof at least, that some one of the causes provided by the statute and stated in the notice authorizing their taking existed at the time and continues to exist; and where the practice has been pursued of attaching to the notice an affidavit setting forth the existence of one of the causes for taking the deposition as set forth in the statute, such affidavit would be prima facie evidence of such fact.

The plaintiff was called as a witness for himself, and testified that at the time of the collision he was sitting in his seat, as if on the edge, and leaning back about straight, with his feet braced on the brace under the next seat, and that the jar of the train caused him to double up,—to shut up like a hinge; that he was sitting next the window, and his wife next the aisle in the same seat; that his wife asked him

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what was the matter, and then the plaintiff stood up in the aisle; that a good many people were thrown into the aisle, and others thrown over their seats; that after the people were out of the aisle the plaintiff got up and moved into the next car, into which the fireman and engineer had been brought; the fireman was pretty badly cut about the head, and that the plaintiff took hold of and washed his head; that he, plaintiff, thought he was severely shocked, but could not think he was seriously hurt; that the train was drawn back into the depot, a new train made up, and that the plaintiff and his wife took passage on the new train that was made up, and went on towards Columbus; that, while the plaintiff was washing the fireman's head, there was a man came in and looked at the fireman and said, "I am the fool"—

Objection was here made by the counsel for the defendant that what the man said was hearsay testimony and ought not to be admitted, and asked the court to stop the witness, and not allow him to state anything further. As a further ground of objection, counsel for defendant stated that it did not appear that the man who said something had any connection with the defendant; *second*, that the statement is not a part of the res gestæ; that it appears that the statement was made by a man in the passenger train of the Columbus, Hocking Valley & Toledo Railroad, upon which the plaintiff was riding; and that it was made subsequent to the accident; *third*, that it was not competent to prove the statement of any brakeman of the Wabash train at any other time, so as to bind the company, it not appearing in evidence, first, that the person was an employee upon the train of the company; second, it not appearing that he had authority to act in the particular matter; third, it not appearing in any way that it was his duty to open the switch; fourth, it not appearing in any way that the duty of opening the switch had been laid upon him as a servant of the defendant company. The plaintiff then testified that the man who came into the car said: "I am the man that caused the accident. I am the man that opened the switch." The witness further testified

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that the person speaking had on a badge marked "brakeman," and he was allowed to testify, against defendant's objection, that he understood, from what was said by the by-standers, that he was a brakeman on defendant's train.

The counsel for defendant requested the court to charge the jury that the alleged declarations of the brakeman do not bind the defendant, and such declarations must be made during the very transaction in order to bind the company at all; which request the court refused. This was error. The statement made by the brakeman, after the accident, as to his own acts as the producing cause, is not competent evidence as an admission to fix liability upon the company. It was no part of the res gestæ, for the reason that such admission was not made while in the execution of his duty, or while the act to which it referred was being performed, and he was not so connected with the corporation defendant as to make his admissions the admissions of defendant. The charge should have been given as requested; and the testimony was also inadmissible, and ought to have been excluded on the objection made.

The evidence received was that a person wearing the badge of a brakeman came into the car where plaintiff was, immediately after the accident, and stated that he was the man that caused the accident; that he was the man that opened the switch. This testimony was received manifestly for the purpose of binding the defendant by an admission made by its agent. It could not be claimed that the testimony was admissible to prove the fact that the brakeman opened the switch. Such testimony would be clearly hearsay, as applied to the proof of such fact; as much so as the declaration of any other person, being an entire stranger to defendant, made in the hearing of the plaintiff. If an agent has knowledge of any material fact, it is to be proved by his testimony, not by his assertion. If the declaration of this person was receivable at all, it must have been because it was an admission made by an agent by which the principal is bound, as an admission made by him. But to be binding upon the principal, as his admission, it must have been made

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by an agent having authority to represent the principal in the transaction in which it was made; and if made respecting his acts, two things must concur, at least, in order to bind the principal: the acts must have been authorized or performed in the line of duty of the agent; and the declarations must have formed part of the res gestæ. The proof received failed to show, 1st, that the person making the statement was an agent of defendant; 2d, that such declaration was made while such person was in the performance of any duty for defendant. And it is apparent that such declaration was no part of the things done by such person as agent for defendant, so as to constitute a part of the res gestæ. So far as the record shows, the act of the person making the declaration, and to which he referred, was that of an entire stranger to defendant. And if it be conceded that the person making the statement was the brakeman for defendant, yet, so far as this record shows, he may have done the act through malice, and entirely outside his duty, and one for which he might be personally liable, but for which defendant was in no manner responsible.

There were numerous other exceptions taken, many of them without merit, and others unnecessary to pass upon here, as they will not be likely to arise upon a re-trial.

For the errors mentioned

The judgment is reversed, and a new trial granted.

The other Justices concurred.

LOUISA SMITH v. CHAS. D. HOLMES.

Negligence of register of deeds—Pleading—Evidence.

1. Damages for negligence are recoverable against a register of deeds who undertakes to furnish plaintiff a full abstract of the title to lands which the latter desires to purchase if, in consequence of the careless omission therefrom of any mention of a particular incumbrance the purchaser is put to additional expense to perfect his title.

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2. Record entries in the office of a register of deeds, whether in his own handwriting or not, are competent evidence in an action against him for negligence in failing to give information of the matters of record.

3. Anything outside of the facts necessary to state a cause of action is surplusage; the necessary facts, however, must be stated.

4. A memorandum upon an abstract of title in the words "examined to date, Nov. 15, 1875," and signed by the register of deeds, whether a certificate or not, is admissible as res gestæ in an action against the register for negligence in carrying out an agreement to furnish a full abstract.

5. The introduction of the words "falsely and fraudulently" as well as the words "carelessly and negligently" is surplusage in a count the gravamen of which is expressed to be negligence merely.

6. A count in a declaration must be construed as an entirety in ascertaining what its gravamen is.

7. The allegation of a non-feasance instead of a misfeasance marks the difference between an allegation of negligence and one of fraud.

Error to Calhoun. (Hooker, J.) April 25.—June 11.

CASE. Defendant brings error. Affirmed.

Frank G. Holmes and *Wm. H. Porter* for appellant.

James H. Campbell for appellee. One who contracts to examine the records in a registry of deeds for another, and to inform the latter of all conveyances which appear of record affecting the title to a certain description of land, engages that he possesses the knowledge and skill requisite for the work, and undertakes that he will do the work carefully, and if for want of proper care on his part an incumbrance is overlooked, and injury results to his employer through his negligence the injured party is entitled to recover: *Chase v. Heaney* 70 Ill. 268; Add. on Cont. 400; *Rankin v. Schaeffer* 4 Mo. App. 108; Whart. on Neg. § 751; *Wakefield v. Chowen* 26 Minn. 379; and it is immaterial that there was no proof of a fee paid for the search: Shearm. & Redf. on Neg. § 228; the declaration is for negligence and properly framed, and is not for fraud and deceit: *Addison v. L. S. &c. Ry. Co.* 48 Mich. 155; *Lucas v. Wattles* 49 Mich. 380; *Batterson v. C. & G. T. Ry. Co.* 49 Mich. 184; *Necker v. Harvey* 49 Mich. 517; if a malicious or wrongful intent be unnecessarily stated it need not be proved: *Williamson v. Allison*

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2 East 446; in actions for torts a party proves such of the allegations of his declaration as he can, and his failure to prove other statements does not prevent his recovery if he proves any good ground of action: *Fisk v. Hicks* 31 N. H. 535; *Lyons v. Merrick* 105 Mass. 71; in torts the plaintiff may prove a part of his charge if the averment be divisible and there be enough proved to support his case: Chitty on Pleading 401.

CHAMPLIN, J. The defendant was register of deeds of Calhoun county in 1874 and 1875, and was sued by plaintiff in an action of trespass on the case. The declaration contains three counts. The second count is the only one upon which a recovery can be supported, and it states that on November 15, 1875, one John J. Lovett was the owner in fee of certain land, describing it, and that there were three certain mortgages upon it at that time, which the pleader numbers one, two and three, and states the parties, dates of mortgage, and time and place of the recording of the same, respectively; that they were all valid and subsisting incumbrances on the land; that on the 15th day of November, 1875, defendant was register of deeds of Calhoun county, and acted as such, and had held the office from the first day of January, 1873; that mortgage number three was left with him for record April 21, 1874, and his fees paid for recording, and thereupon he forthwith entered it in the entry-book of mortgages kept in his said office, pursuant to law, in his own handwriting, and thereafter, forthwith, on said 21st of April, 1874, recorded said mortgage at full, pursuant to law, in Liber A. M., at page 133, and on said day entered in the local index to said liber, and also in the general index to mortgages in his office, reference to said mortgage, and to the liber and page wherein the same was of record, and the description of the land therein, which entries and record books remained in his office, and he knew, of his own knowledge, of the existence of said mortgage, and of the record of the same, then being in his said office; that plaintiff, upon making the bargain with Lovett for the purchase of the land, and before completing the purchase or

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receiving the deed or paying the purchase money, on the 15th of November, 1875, went to the said office of the said register of deeds, in the city of Marshall, in said county, and there found the defendant therein, and in possession and control thereof, and of all of the records, files and papers therein and thereto belonging; that plaintiff then and there requested the said defendant to examine the records in his said office, and inform her and give her a statement of all mortgages and incumbrances of record in said office, covering or affecting said land, and then and there paid to said defendant the fee for such examination and search required by him. And the said defendant then and there undertook and agreed to comply with the plaintiff's said request, and to inform her if there was any other mortgage on said land; and thereupon it then and there became and was the duty of the said defendant to examine and search the records in his said office in a careful, proper and diligent manner, and to inform the said plaintiff of the existence of said mortgage number three. Yet said defendant, not regarding such his duty, but contriving and intending to injure and aggrieve the said plaintiff in that behalf, did not nor would examine or search the said records in a careful, proper and diligent manner, nor inform the said plaintiff of the existence of said mortgage number three: and, on the contrary, that the defendant thereupon examined said records in his office, or pretended to, but that he made such examinations in a careless, negligent, insufficient manner, and after making the same, then and there neglecting his duty in the premises and his obligations to the plaintiff, to correctly and truly inform her of all mortgages and incumbrances on said land, carelessly, negligently, falsely and fraudulently informed and stated to the plaintiff that there were only two mortgages of record which covered or affected said land, to-wit, the mortgages numbers one and two aforesaid, and did not give to the plaintiff then, nor at any time, any information, statements, intimations or notice that the said mortgage number three, from said Lovett to said Rudman, was of record in his said office, or in existence. That thereupon, on

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said 15th day of November, 1875, after being informed by the defendant that the said mortgages numbers one and two were the only mortgages then on said land, the plaintiff, relying upon the said statement and information given by the defendant as aforesaid, and believing in good faith thereupon that the said mortgages numbers one and two, aforesaid, were the only mortgages or incumbrances on said land, and without any knowledge, intimation or notice of the said mortgage number three, purchased the said land of the said Lovett, the owner thereof, as aforesaid, for the sum of twenty-five hundred dollars, and then and there paid the said sum to the said Lovett as the purchase price of said land, less the sum of eight hundred dollars, as the amount due on said mortgages numbers one and two, as aforesaid, which mortgages the plaintiff, by the terms of the purchase of said land, assumed and agreed to pay as a part of the consideration and purchase for said lands, and the said amount of eight hundred dollars was deducted by the plaintiff and retained by her: and the plaintiff paid to said Lovett the balance of the purchase money, being the sum of seventeen hundred dollars in cash; that the said sum of twenty-five hundred dollars was the full value of said land at said time; and thereupon, on said day, said Lovett executed and delivered to the plaintiff a deed of conveyance of said land, and plaintiff thereby became owner in fee-simple of said land, and immediately thereafter took possession thereof, and hath since that time up to the present continued to be, and still is, such owner and possessor of said land; that the plaintiff took said deed and paid said money for said land without any knowledge, notice or intimations of the existence of said mortgage number three, being kept in ignorance thereof by the said carelessness, negligence and fault of the said defendant in the premises, and the plaintiff had no knowledge or notice of the existence of said mortgage until after proceedings were instituted by said Rudman to foreclose said mortgage, as hereinafter stated. That Rudman commenced proceedings to foreclose, and that plaintiff was obliged to and did pay the amount due thereon; that

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Lovett was at the time of purchase, and ever since has been, insolvent; and that plaintiff, by the said neglect, carelessness and fault of defendant in the premises, has suffered great loss, and been compelled to pay a large sum of money to obtain a discharge of mortgage number three, and free her land from said incumbrance, to her damage of one thousand dollars.

We have set out this count quite fully and, in some parts, literally, for the reason that the errors assigned are based mainly upon alleged variances between the declaration and proofs, and upon the further allegation that the declaration is based upon the fraudulent conduct of defendant, and that no recovery can be had unless fraud is proved as the cause of the injury. If the plaintiff were to be confined to the third count of her declaration the objection made would be good, as that count alleges the statements to have been made falsely, willfully and fraudulently, instead of negligently and carelessly; but if any one of the counts contained in the declaration is good it will support the verdict. It is quite evident that the gist of the second count is based upon the negligence of the defendant in not ascertaining and informing plaintiff of the existence and record of mortgage number three. It contains considerable redundancy of expression, and some immaterial allegations which might have been omitted. The contract, which formed the basis of the obligation of the defendant, and the negligence or careless performance thereof by him, are set forth with sufficient certainty. The negligence alleged consists of the careless performance of an obligation assumed by contract. The averments that defendant entered the mortgage in his own handwriting, and afterwards recorded it, may be treated as surplusage. Such fact was wholly immaterial, so far as fixing liability for a careless or negligent search. The entries and records were competent evidence as tending to prove negligence, whether they appeared to be in his own handwriting or not. As stated by this Court in *Batterson v. Chicago & G. T. Ry.* 49 Mich. 184, cited in defendant's brief, it was incumbent on the plaintiff to specify the grievance of

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which she complained; but the fact that the entry of the mortgage in question was entered in the index of mortgages in defendant's handwriting constituted no part of the plaintiff's grievance. Pursuing the language of the same authority, she "was bound to set out the combination of material facts relied on as her cause of action, and follow up her allegations by evidence pointing out and proving the same combination of circumstances. Every system of judicial altercation has for its object the accomplishment of two ends: the first to apprise the parties, and the second to apprise the court, of the precise subject of the controversy."

The grievance alleged by plaintiff in the second count of her declaration was that she entered into a contract with defendant whereby he undertook to examine the records in his office and ascertain and inform the plaintiff if mortgages numbers one and two were the only incumbrances on the land described, and that he so carelessly and negligently made such examination that he failed to give her any information of mortgage number three, by reason of which she was damnified. The combination of material facts, both as to negligence complained of and how such negligence resulted to her injury, are sufficiently alleged. In general, whatever circumstances are necessary to constitute the cause of complaint must be stated in the pleading, and all beyond is surplusage. 1 Chit. Pl. 214.

The objection that there was a variance between the abstract offered in evidence and that described in the declaration is removed by the evidence which tended to prove that entries had been made upon the abstract after November 15, 1875. The first count alleged that the defendant certified to the abstract, and counsel objected that the entry under formal certificate, which had been made at a prior time, of the words: "Examined to date, November 15, 1875; CHAS. D. HOLMES," was not a certificate, and in that respect there was a variance. Without stopping to decide whether it is a certificate or not, it was admissible under the second count as a part of what transpired on that occasion between the parties, and in connection with the contract alleged in this count.

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The defendant had been register of deeds from January 1, 1873, and had acted as such; and from his official position and practical experience it may be inferred that he presumed himself capable of searching the records, and giving reliable data of what the records showed. At all events, if he entered into a contract with the plaintiff to examine the records, and inform her if there was any other mortgage upon the land than numbers one and two, then the law implied an undertaking from him that he possessed the required knowledge and skill, and that he would use due and ordinary care in the performance of his duty to the plaintiff in that respect; and if he failed to do so, which failure resulted in damages to the plaintiff, she is entitled to recover. *Chase v. Heaney* 70 Ill. 268; *Clark v. Marshall* 34 Mo. 429; *Bank v. Ward* 100 U. S. 195; Shearm. & Redf. on Negligence § 288; Warvelle, Abst. 7.

The defendant's counsel submitted to the jury certain questions in writing, to be answered by the jury in case they should find a verdict for the plaintiff, which the jury answered as follows: "*First.* Did the plaintiff make a contract with the defendant to correct an abstract of the title to the property named in the plaintiff's declaration? The jury answered, 'Yes.' *Second.* Did he make and correct the abstract for John J. Lovett? The jury answered, 'No.' *Third.* Did he correct the abstract before or after the sale to plaintiff? The jury answered, 'Before.' *Fourth.* Did the defendant receive any pay for his services, and who from? The jury answered, 'Waived payment.' *Fifth.* Did the plaintiff rely upon the examination of the abstract by Townsend as to whether he, Townsend, would loan her money on that title? The jury answered, 'No.' *Sixth.* Did the defendant use reasonable care in correcting that abstract? The jury answered, 'No.'"

These findings of fact establish the contract entered into between the parties, and the failure on the part of the defendant to exercise reasonable care in the performance of his duty, and the record before us shows that evidence was introduced to prove the other material facts necessary to be estab-

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lished in order to warrant a recovery. The position taken by counsel for defendant, that because the words "falsely and fraudulently" are used in connection with the words "carelessly and negligently" in describing defendant's dereliction of duty, makes it incumbent on the plaintiff to prove actual fraud in order to entitle her to recover, is untenable. As before stated, the gravamen of this count of the declaration is the negligence of defendant, and she states, before the conclusion of this count, that she suffered the loss complained of by plaintiff's neglect, carelessness and fault in the premises, and not on account of any fraudulent act or statement of defendant. In arriving at what the grievance complained of is, and the manner in which the wrong was inflicted, the whole count must be taken and construed together. The facts and circumstances alleged show that there was no intent to do a wrongful act, or to omit the performance of a duty, but the absence of the proper attention, care or skill. It alleges strictly a non-feasance and not a misfeasance, which marks the distinction between negligence and fraud. *Gardner v. Heartt* 3 Den. 232, 236.

The charge of the court was in accordance with the views herein expressed.

Perceiving no error, the judgment of the circuit court is affirmed.

The other Justices concurred.

JAMES R. STORRS v. JOHN WALLACE, EUGENE WALLACE AND EDWARD LEONARD.

General demurrer—Multifariousness—Costs.

A complaint for multifariousness was not considered in affirming an order overruling a general demurrer to a bill which in fact stated a case for equitable relief; the costs in the case were within the control of the trial court and could be adjusted on final decree.

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Appeal from Shiawassee. (Newton, J.) Apl. 25.—June 11.

BILL to clear title. Defendants Wallace appeal. Affirmed.

A. R. McBride for complainant.

Gilbert R. Lyon for defendants.

CHAMPLIN, J. Defendants John and Eugene Wallace demurred to the bill of complaint filed by complainant in the court below to compel them to assign to complainant a certain mortgage called the Hughes mortgage, or in default pay him the amount of the mortgage, and to have the assignment to defendant Leonard of the same mortgage declared void, and to compel defendant Wallace to reconvey to complainant the interest in a certain twenty-nine acres of land which had been deeded by complainant to Franklin Scougale. The bill is quite lengthy, and sets forth in considerable detail the pleadings and proceedings of another suit between Storrs and his father as complainants, and Franklin Scougale and defendant John Wallace, which was determined in this Court, and is reported in 48 Mich. 387. It is unnecessary to set forth the statements of the bill in this case. The relief prayed for is founded upon charges of fraudulent acts and conduct of the defendants connected with the transactions litigated in the former suit, and, so far as defendants are concerned, of acts which occurred after the decree in the court below, pronounced in the former suit, had been appealed to this Court, and while it was still pending here. The demurrer is for want of equity and multifariousness, and was overruled by the court below. We think the bill states a case for equitable relief, and we cannot see that the defendants will be particularly injured by the multifariousness complained of, as all costs in the case are within the control of the court, and can be adjusted upon the final decree.

We think the order appealed from should be affirmed, with costs, and the record remitted to the court below for further proceedings.

The other Justices concurred.

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Riel W. Becker v. Isaac H. Vandercook.

Replevin—Demand.

Demand is necessary before bringing replevin for an article which defendant has borrowed from one who did not know whose it was and did not claim ownership, but who found it on his premises, where it had been put for safety long before by another stranger to the title who found it exposed near by.

Error to Ingham. (Gridley, J.) April 25.—June 11.

Replevin. Plaintiff brings error. Affirmed.

Chatterton & Haynes for appellant.

Huntington & Henderson for appellee.

Campbell, J. Becker brought replevin against Vandercook for an old horse-blanket, which plaintiff claims cost him six dollars, and which, when replevied, was worth about half that sum. He recovered before a justice, but was defeated on appeal in the Ingham circuit court, and now brings error.

At the circuit, the facts showing defendant's possession were substantially that on a certain occasion, having temporary need for a blanket, he borrowed this of his son Willis who was a blacksmith, in whose shop the blanket had been left, and who did not know how it came there or to whom it belonged, and who did not himself set up any claim of ownership. There was a conflict of testimony as to demand, and as to defendant's or his son's having any knowledge of plaintiff's claim. According to the defendant's witnesses the blanket was found in an old buggy standing by the shop by one Nathan Mitchell, who was janitor of a school, and did odd jobs of blacksmithing. Mitchell took it up to keep it out of the snow which was falling heavily, and threw it on a bench in the shop, and no further attention was paid to it, and it was used a few times by Willis, and lent to his father, as before mentioned, several months thereafter.

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The court told the jury that no demand would be necessary if either defendant or Willis got it from any wrongful taker, and claimed it from that source. But it was charged, further, that such a taking as Mitchell described would not be wrongful, and that in such case, if both Willis and the defendant acted in good faith and in ignorance of any claim of plaintiff, a demand was necessary.

The jury must have found that the testimony on the part of the defense was true, and the case of the plaintiff not true, and that no demand was made.

We have no doubt of the correctness of this result. It would be a very unreasonable rule to hold that it was a wrong act to take in the blanket out of the storm, or wrong to use it, on the part of either Willis Vandercook or his father, in ignorance of its ownership or of how it came into the shop. There is no good reason why the plaintiff should have replevied the property without giving the defendant an opportunity to surrender it, as he undoubtedly would have done without suit. The suit, without demand, was unjust and oppressive, and the multiplication of expenses in a suit involving a very small sum of money and no equity whatever is censurable.

The judgment must be affirmed.

The other Justices concurred.

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SARAH F. CROSS v. DONALD CROSS.

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Divorce—Final order—Election to insist on plea.

1. Appeal lies from an order in a divorce suit overruling a plea of no marriage.
2. Where a plea is overruled with leave to answer within a limited time, *it seems* that taking an appeal before the expiration of that period may be treated as an election to stand by the plea, and the appeal may be sustained accordingly.

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Motion to dismiss appeal. Submitted June 3. Denied June 11.

George W. Bates for the motion.

Otto Kirchner against.

PER CURIAM. Bill for divorce. The defendant interposed a plea that he was never married to the complainant. The court, on hearing upon this plea, overruled it, and gave defendant leave to answer within twenty days. Without waiting for the expiration of the twenty days defendant appealed, and complainant moved to dismiss the appeal on the ground that the order overruling the plea was not a final order.

The defendant undoubtedly had a right, within twenty days, to elect to abide by his plea, or to answer, under the permission given him. Had he waited till the expiration of the twenty days without answering, and then appealed, we should have had no doubt of his right to take that course. And we are inclined to hold that when he appeals within the twenty days, he thereby elects to stand by his plea, and not to accept the permission given him to answer; and in this view the appeal may be saved.

Motion denied, without costs.

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MARY E. DEVANEY v. MARGARET KOYNE.

Burden of proof—Bill to obtain benefit of deed.

A bill filed by a daughter against her mother to obtain the benefit of a deed from the latter was dismissed, and on appeal the dismissal was affirmed, but without costs of the Supreme Court against either party, where, though the proofs were strong, they did not sufficiently preponderate for complainant to show that the mother's deed to the daughter had ever been fully delivered so as to place the property beyond the mother's control.

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Appeal from Saginaw. (Gage, J.) June 3.—June 11.

BILL to compel delivery of deed. Complainant appeals. Affirmed.

F. L. Eaton and *Albert Trask* for complainant.

D. P. Foote for defendant.

CAMPBELL, J. This is one of those family disputes which arise from doing business without the precautions usual among ordinary parties. Complainant filed her bill to get the benefit of a deed from her mother, the defendant, to herself, which she claims to have been delivered and afterwards surreptitiously taken back and destroyed. The defense is that the deed was never delivered or intended to be delivered during defendant's life, but she had it prepared with the design of having it become operative on her death. The testimony is directly in conflict on the most important facts, and the question resolves itself into the inquiry whether the complainant's case is so clearly established as to authorize us to confirm it in spite of this conflict.

We have not much doubt that the original arrangements out of which the transaction finally grew were designed to secure the property to complainant in some way, but how is certainly left somewhat in doubt. Complainant married against her father's wishes, but with her mother's approval, and was for a time excluded from her father's house. Her father was, nevertheless, attached to her, and finally put her and her husband into possession of the 80 acres in question, with the expressed purpose that it should be held for her benefit. But it is quite probable that the father meant to exercise some discretion as to how and when it should be put into a shape to secure her rights. Subsequently the father and mother quarreled, and the latter began divorce proceedings. These were compromised by an arrangement whereby the wife was to be secured $2000. She also insisted on having the title to this 80 acres, and it was conveyed to her. But while no written trust was created and no conditions

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imposed, there is no serious doubt that she received it on an understanding that she should hold it for Mary's benefit, and that it was more a matter of female pride than anything else which led to her wishing the gift to come from her, in form, than from her husband. As already said, no conditions were attached to the conveyance to the wife from the husband, but there was, we think, such an understanding. The fact, however, that the matter was left in this condition is pretty strong evidence that there was no agreement that the land was to be at once conveyed out and out to Mary. The husband of Mary was evidently a cause of more or less family difficulty with her relatives, and we do not think that the intentions for her benefit were entirely put in form, even verbally.

There was no deed drawn to Mary at the time the mortgage and conveyance were made to defendant by her husband. But when defendant, according to her own testimony, took her own papers from the office of Mr. Hanchett, her counsel, who had drawn them, and with whom she had left them, she got him to draw a deed to Mary, which is the one in dispute. His testimony is clear that he advised her not to deliver it, but to keep it in her own hands, so as only to become operative at her death. She swears that this intention continued, and that she never delivered it. Mary swears as positively that she did deliver it, but gave her some caution about letting Mary's husband have access to it, and that finding it afterwards in a trunk of defendant's, to which defendant had sent her on an errand, she supposed her mother had put it there to keep it from Devaney. Subsequently defendant, who seems to be a woman of quick temper and some willfulness, took offense at Devaney and destroyed the deed. Defendant admits she showed it to Mary, but claims it was not delivered, and that she told Mary she meant to keep control of it. Subsequently she conveyed the least valuable 40 acres to Mary. There is some dispute as to how far this transaction was understood. There is testimony which seems credible, that defendant frequently spoke of having conveyed to Mary; but it is quite possible that in doing so she merely

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referred to the execution of this deed, which was no secret, and did not mean to do any more.

In such a conflict, where, upon the central fact, there is room for misapprehension, we do not feel justified in reversing the decree. The complainant has the burden of proof, and we are not satisfied it preponderates for her. While there is strong testimony in her behalf, there is also very strong testimony that defendant, at any rate, never supposed she had put the property beyond her control. And there is a good deal to indicate that complainant's husband was the cause of the hesitation to put the land where he could get a husband's influence in managing it. Upon the whole case, we do not feel justified in reversing the decree of dismissal.

Complainant seems to have been a dutiful daughter, and it may be fairly expected that her mother will in due time perform what may not be her legal duty, but what, nevertheless, seems to have been contemplated and left to be carried out by the confidence of the parties. Defendant will no doubt respect her own maternal obligations.

The controversy is one which has not been begun or continued without probable cause, and while we leave the decree below to stand affirmed, we are not disposed to give costs in this Court against either party. Both will bear their own costs.

The other Justices concurred.

ELEANOR J. SWAIN ET AL. v. WARREN M. BALDWIN.

Rescission of land contract.

1. A man had a contract from his brother for certain land, the vendor reserving the right to declare it void if any payment was a month overdue. The vendee was to pay all taxes. The contract was in duplicate. No one held continuous possession of the land. Only

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one payment was made on the contract and several years later the vendor, in furnishing a tax-list of his lands, included the property in question as if it were land upon which it was his duty to pay the taxes, distinguishing it from some other land on which others ought to pay. After the death of both parties both copies of the contract were found among the vendor's papers, and his administrators filed a claim against the vendee's estate for the amount unpaid on the contract. *Held*, that on the facts above stated they did not make out a case; the facts indicated that the contract had been rescinded.

2. A judge's reasons for an instruction to the jury are immaterial if the instruction is warranted.

Error to Berrien. (A. J. Smith, J.) June 3.—June 11.

Appeal in probate. Claimants bring error. Affirmed.

Cutcheon, Crane & Stellwagen for appellants.

Clapp & Bridgman for appellee.

COOLEY, C. J. On June 7, 1871, Isaac N. Swain of Detroit made a contract to sell to his brother, Russell Swain, residing in Watervliet, Berrien county, three village lots in Watervliet for the price of $200, of which $50 was to be paid down; $50, June 7, 1872; $50, June 7, 1873; and $50, June 7, 1874,—with interest at 7 per centum, payable annually, on all sums remaining unpaid. Russell Swain was to have possession of the lots from the time of purchase, and was to pay all taxes and assessments thereafter made or levied upon them. If any payment stipulated for was suffered to be thirty days overdue, the vendor was to be at liberty to declare the contract void for that reason, and to treat the vendee as a tenant holding over without permission. The contract was reduced to writing, and seems to have been executed in duplicate. No payment was made upon it after the first.

The vendor died in 1880 and the vendee in 1882. After the death of the latter the administrators of Isaac N. Swain filed with the commissioners on the brother's estate a claim for the amount unpaid on the contract, and on hearing, the commissioners disallowed the claim. The administrators

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appealed to the circuit court, and upon trial in that court the jury was instructed to return a verdict for the defendant estate. The case now comes to this Court on writ of error.

The parties to the contract being both deceased, there was difficulty in getting at the facts, and there are many indications in the record that the relations of the parties are not fully explained. Russell Swain seems to have been a man of much less means than his brother, and the brother appears to have been assisting him somewhat, instead of demanding payment from him. But little seems to have been done with the lots, and the possession by any one was not continuous. The duplicate contracts, as they appear in the case, both come from Isaac N. Swain's possession, and it is shown that in January, 1879, he furnished for tax purposes over his signature a list of lands in Watervliet, to which he attached the following:

"Here follows a true description of all my land individually owned by me in the township of Watervliet, Berrien county, Mich., not including such as I have an interest in, in partnership with Burrill A. Olney, Esq., which latter may properly be called the mill company's lands. N. B. The taxes on these descriptions, underscored with red ink, properly belong to others to pay, but I prefer and want to pay them rather than have them returned delinquent."

Then followed a description of lots, including those described in the contract with his brother, and these latter were not underscored.

The facts here mentioned, namely, the furnishing of this list containing a specification of the lands as his own, and indicating so distinctly that it belonged to him to pay taxes, and the possession of the duplicate contracts, raise a presumption that in some manner the contract had been rescinded. The vendor had had a right to rescind it for nearly eight years before his death, for the default in payment had continued for that time; and while there are no facts from which we should infer that he had been insisting upon strict legal rights, a surrender of the contract by the brother, under the circumstances, and his acceptance of the surrender, would

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have seemed a very natural thing between brothers who, apparently, were on proper terms of amity. If, under the circumstances, the estate of the vendor insisted upon the contract as outstanding, the administrators were fairly called upon to explain the facts which tended so strongly to show the contrary; and we find in the evidence nothing which explains or tends to explain them. We are, therefore, of opinion that the circuit judge was warranted in instructing the jury that the plaintiffs had made no case. The reason assigned by him for this conclusion is immaterial.

The judgment must be affirmed.

The other Justices concurred.

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BARBARA SCUDDER v. ANDREW A. ANDERSON.

Agency—Conversion by sale on execution—Fixtures.

1. The general agent and manager of a mining company is presumably empowered to sell its personal property.
2. The sale on execution of personal property belonging to a third person amounts to a conversion, whether the officer making sale removes it or not.
3. Ordinary movable office furniture and ordinary vehicles are not fixtures, and the question whether personal property in use about a mine can be so regarded, is a question of the intent with which it was attached to the freehold.
4. Personal property that can be removed from the land cannot be part of the realty, when the owner does not also own the land.

Error to Marquette. (Grant, J.) June 4.—June 11.

TROVER. Defendant brings error. Affirmed.

F. O. Clark for appellant. A general agent has no such authority as will enable him to close the business: *Buchoz v. Grandjean* 1 Mich. 367; *Kirby v. Ingersoll* Har. Ch. 172; everything connected with a mine and necessary to its opera-

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tion, whether attached or not, is a fixture: *Ege v. Kille* 84 Penn. St. 333; *Patton v. Moore* 16 W. Va. 428: 37 Am. Rep. 789; *Green v. Phillips* 26 Grat. 752; *Lewis v. Rosler* 16 W. Va. 333; *Congregational Society v. Fleming* 11 Ia. 533; *Palmer v. Forbes* 23 Ill. 301; *McLaughlin v. Johnson* 46 Ill. 164; *Bishop v. Bishop* 11 N. Y. 123; *Heaton v. Findlay* 12 Penn. St. 304; *Voorhis v. Freeman* 2 W. & S. 116; *Pyle v. Pennock* id. 390.

Ball & Hanscom and *J. P. Whittemore* for appellee. Manual possession is not necessary to conversion, nor application to one's own use, if such control is assumed, by a possession actual or constructive, as deprives the owner of his dominion for any purpose: *Connah v. Hale* 23 Wend. 462; *Murray v. Burling* 10 Johns. 172; *Webber v. Davis* 44 Me. 147; Cooley on Torts 448; where an officer levies upon property, the owner's right of sale is defeated for the time being, and this renders the officer liable in trover, if the levy was wrongful: *Polley v. Lenox Iron Works* 2 Allen 182; *Reynolds v. Shuler* 5 Cow. 323; *Bristol v. Burt* 7 Johns. 254; 6 Wait's A. & D. 164.

CAMPBELL, J. Plaintiff, as vendee of John Scudder, brought this action in trover for the conversion of various articles formerly owned by the Marquette & Pacific Rolling Mill Company, and used on their mining property in Marquette county. This company had, up to 1878, worked an iron mine on 40 acres of their own, and an adjoining 40 acres in which they owned seven-sixteenths in fee, and had a lease of the other undivided interest. In October, 1877, a levy of execution on their landed mining property was carried to a sale, one Ward being the purchaser. On the 3d day of September, 1878, William W. Wheaton, who was general agent in charge of the company's interest, sold the property in suit here to John Scudder, in payment of a claim which Scudder then held against the company for his services as secretary, to the amount of abont $1800. In August, 1879, defendant, who was sheriff of Marquette county, levied on this property under claim of legal process against the company, and sold it.

This case came on for trial, and the plaintiff recovered judg-

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ment. Various errors are assigned, relating chiefly to questions of title. Some other objections were also argued, which will be referred to.

A point was made that sufficient evidence was not given of Wheaton's authority to sell. But if this property was movable property, we can see no reason to doubt the power of a general agent and manager to dispose of it. Purchases and sales of personalty for use about mining premises must be of frequent occurrence, and would presumably be under the control of the general manager. The point was not strenuously pressed. We think it was not well taken.

It was also claimed that there was no sufficient interference with this property to amount to a conversion. Scudder, according to his testimony, had moved some of the articles which he had bought, and stored them. Most of them, however, remained on the premises of the company, and some had been allowed to be used in its operations. The defendant testified that he found this property, now in dispute, in the possession of Capt. Berrington, who was working the mine, and told him he came to make a levy; that he did not remove the property, but inventoried it, and went from place to place where it was, to do so. He then advertised it, and subsequently sold it in the same way. As here was an actual sale, admitted by the defendant himself under a claim adverse to that of plaintiff, we think plaintiff might fairly treat it as a conversion. The person in charge had been formally notified of the levy, which seems to have followed all the legal forms, so that it would have made an effective lien, if the property had belonged to the judgment debtor. Such a sale, fully completed, is all that the defendant could have done to complete a conversion. The property was in his presence, and the purchaser had all the authority to remove it that defendant could give him. We can see no further action necessary to hold defendant. He had exhausted his official powers.

The title of plaintiff was attacked on two grounds: *first*, because the property was claimed to have been disposed of in fraud of creditors; and *second*, because it constituted a part

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of the realty, and could not be separated from the ownership of the land. The defense claimed that a presumption of fraud arose from the failure of the parties to make a change of possession of such a nature as the statute requires. It is sufficient to say that upon this question the court below took their view of the law, and instructed the jury sufficiently to throw the burden of sustaining the good faith and legal validity of the sale on the plaintiff. The charge was full and emphatic, and open to no objection on that head. We need not consider whether the defense were in a position to rely on this ground, inasmuch as the ruling was on that side. The fraud, after testimony went in, was a question of fact and not of law.

The chief question argued was upon the quality of this property as real or personal.

The property declared for consisted of several hundred feet of gas-pipe, a set of blacksmith's tools, a portable boiler, a large platform scale, blacksmith's bellows, and some other articles, partly of furniture, and partly carts, sleighs and other things used about the mine above and below ground.

It was claimed by the defense that most of these things were so attached to the business as to belong to the freehold, and that they passed on the sale of the mine and could not belong to plaintiff under such a transfer as was made to Scudder.

We can conceive of no circumstances under which chairs, tables, movable desks, stoves, tools and ordinary vehicles could be classed as fixtures at all, and counsel disclaim any such idea. It would be possible for pipes, large bellows and perhaps fixed scales to be so treated if attached in such a manner as to form part of the fixed property. But movable pipes, or anything else, which are in fact moved from time to time, and used for different purposes and in different places, could hardly be so considered. The court below could not, as matter of law, hold any of the property in dispute as necessarily fixtures. At best, it was of ambiguous capacity, and might or might not be so regarded. There was no great conflict of testimony in this case concerning the uses of the various items of property, and we think

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the court gave the jury correct instructions on the whole subject. There was very little of this property which could be regarded as in any way annexed to the freehold. The court told the jury, as to all such articles annexed, that the purpose and intention of their annexation, and their adaptedness to the uses to which they were appropriated, would be important criteria, and that mere annexation would not be conclusive. In giving his instructions, the judge went quite fully into an explanation of the doctrines heretofore laid down by this Court on the subject. The argument of the defense does not present any great variance from the charge upon the legal quality of fixtures, except in claiming that there was less room for the discretion of a jury than the court assumed was proper. But in our opinion there was nothing in this case which would have justified the court in taking away from the jury, in favor of the defense, any of the articles claimed to be fixtures. The rulings were quite as liberal as they ought to have been.

The defense cannot have any cause of complaint against the distinction taken in the charge between articles annexed to the realty owned by the mine, and articles annexed to the realty in which the company had less than a half interest. It is impossible to regard personal property capable of removal from the land, which does not belong to the land-owner, as part of the realty. This was decided in *Adams v. Lee* 31 Mich. 440 and *Robertson v. Corsett* 39 Mich. 777. If there was any objection to what the court below ruled on this subject, it was not one which could injure defendant; for if the whole mining business is treated as a single interest, it would rather tend to detach all fixtures from the naked realty, if the title to them was not identical with that of the mine as worked, and to make the whole savor of personalty. But we are not called on to consider this possibility, as it is not presented for decision.

We have not thought it necessary to re-discuss questions which are not different from those which have been before us on former occasions. And while the ingenuity of counsel has presented the issues in various lights, we do not think the

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record requires any further discussion than we have given it in the references already made.

We think the judgment should be affirmed.

The other Justices concurred.

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THOMAS MITCHELL v. FRANKLIN WELLS.

Action at law on partnership obligation—Proof of set-off.

1. An obligation legal in form can be sued at law; and a note by one partner to another, even if made to him as a trustee for the firm's benefit, can be sued at law according to its terms, and the defense that it is a partnership matter must either be made at law or under proceedings brought by defendant in equity to establish it.

2. The burden of proving set-offs is always on the defendant who desires to establish them; and it does not fall on plaintiff even where the suit is on an obligation that has been received in consideration of the renewal of the set-offs.

Error to St. Joseph. (Pealer, J.) June 5.—June 11.

ASSUMPSIT. Defendant brings error. Affirmed.

H. H. Riley and *J. B. Shipman* for appellant. Accounts between a partner and the firm must be adjusted in equity: Parsons on Partnership 268, n. *f.*; 282, n. *g.*; Collyer on Part. § 281, n. 1; settlements between partners can only be enforced by bill: *Collamer v. Foster* 26 Vt. 754; *Niven v. Spickerman* 12 Johns. 401; partners cannot generally sue each other at common law: *Casey v. Brush* 2 Cai. 296; not even on a stated account, without proof of an express promise to pay: *Murray v. Bogert* 14 Johns. 318; *Halsted v. Schmelzel* 17 Johns. 80; *Westerlo v. Evertson* 1 Wendell 532; nor bring assumpsit on a balance due on a settlement of their partnership account: *Gulick v. Gulick* 14 N. J. 578; *Chase v. Garvin* 19 Me. 211; *Burley v. Harris* 8 N. H. 233; *Estes v. Whipple* 12 Vt. 373; *Davenport v. Gear* 2 Scam. 495; *Dewit v. Staniford* 1 Root 270; where there are more than two partners, an action will not lie for the settlement of a

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co-partnership account, but only a bill in chancery: *Beach v. Hotchkiss* 2 Conn. 425; *Austin v. Vaughan* 14 La. Ann. 43; *Younglove v. Liebhardt* 13 Neb. 557; *Farrar v. Pierson* 8 Am. Rep. 439; *Wheeler v. Arnold* 30 Mich. 304; *Elder's Appeal* 30 Mich. 474; *Learned v. Ayres* 41 Mich. 677.

F. W. Knowlen and *Dallas Boudeman* for appellee.

CAMPBELL, J. Mitchell recovered judgment in the circuit court for the county of St. Joseph on a note made by defendant to his order for $400, and 10 per cent. interest. This note was dated November 1, 1851, payable in one year, and was renewed at successive times in writing, so that a long time has passed since its maturity. The defense was put on the ground that it was connected with partnership transactions, and dependent on them, and paid by credits.

On November 1, 1851, plaintiff and defendant and Thomas Langley became partners in a furnace and manufacturing business, with a paid-up capital of $9000, made up chiefly of property suited to the business. Of this capital, which the partners were bound to furnish equally, Mitchell owned $4500 and Wells $3929. Langley paid in $729, and for the balance of his quota was to pay interest to Mitchell for his excess of $1500, and to Wells for his excess of $929.

On the trial below, Wells claimed that this note of $400 was given to even up his own capital, and that it was agreed it should be settled up with the partnership business. He further claimed that, on the final winding up, a balance remained in his favor of enough to cancel it, and that Mitchell held that balance.

There were two theories suggested on the argument for the defendant. One was that the note was a matter between Wells and the firm, and for that reason entered directly into the partnership interests and accounts. The other made it merely dependent by agreement and dealings with Mitchell. Plaintiff denied both.

Upon the first theory the argument dwelt at length, and the error complained of was that the court refused to charge that the remedy was solely in equity and not at law, if, by

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the agreement of the parties, the note in question became a part of Wells' capital in the firm.

It is not very clear that the defendant's testimony tended to establish this theory. But, assuming that it did, we do not think that, when viewed in connection with the other facts and charge, this refusal was erroneous.

The note, upon that theory, was a debt which it was the duty of Wells to pay according to its terms. If this had been a corporation instead of a partnership, there can be no doubt it could be sued at law. There was as distinct an obligation to pay it in the one case as in the other. The only reason why an agreement by a partner with the firm cannot be sued at law is technical, and rests on the rule that at law all the promisees must be plaintiffs and the promisor defendant, and that no man can sue himself at law, while, in equity, if all parties are before the court, their position as complainants and defendants is not always very important. But there never was any difficulty in bringing suit by one or more partners against another on his covenants. Neither has there ever been any difficulty in holding a partner liable on a promise to any one as a trustee for the firm benefit, so long as the firm is not a party. Such was the present case, assuming the purpose to have been as claimed. This promise was not made to the firm, but to Mitchell. It is a legal obligation in form, and therefore may be sued at law according to its terms. Any such ground as is relied upon must come in either as a defense at law, or under proceedings brought by defendant in equity to establish it. There is no case that we are aware of where an obligation legal in form cannot be sued at law.

This, as already suggested, was the chief point argued. There was no exclusion of testimony to show the arrangements between Wells and Mitchell in regard to this note, or the right of plaintiff to have it paid out of assets; but whether there was such an agreement, and if there was, whether the state of the assets was such as to furnish means and impose the duty of wiping it out, were questions of fact which seem to have been fairly submitted to the jury.

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It is claimed, however, that inasmuch as by the terms of renewal, the new promise was in consideration of the renewal of any legal set-offs, the burden of proof was on plaintiff to explain what those set-offs were. We can see no force in this claim. The burden of establishing set-offs must always be on the defendant who desires to establish them. He may or may not choose to use them for defense, instead of for purposes of suit separately. But there is no reason for calling on a plaintiff to prove anything but his own cause of action.

The court opened the door very wide in favor of the reception of the defense. We cannot review the action of the jury, and we cannot see that anything was improperly given to them. It is possible that defendant has been damnified by not suing in equity. But the state of the accounts was allowed to go to the jury, in case they found the agreement claimed to exist. We do not see from this record any certainty that there is not still room for equitable action.

The testimony about the old accounts does not appear to have become material, in the shape in which the parties left the issues on trial.

The judgment must be affirmed.

The other Justices concurred.

ARTHUR W. STICKLE v. E. EUGENE HASKINS ET AL.

Dismissal of appeal—Settlement of case—Costs.

1. Dismissal of an appeal on the ground that appellees had had no notice of the settlement of the case, was *denied* where it appeared that it was settled in good faith, and that they knew of the proceedings and might have appeared.

2. Where a case was imperfectly settled in consequence of the willful or negligent absence of the appellees, it was remanded for settlement

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subject to a charge against the appellees on final decree of all costs resulting from their neglect to raise objection until after the case as settled had been printed.

Motion to remand. Submitted June 10. Granted June 11.

Fletcher & Wanty for the motion.

C. P. Black against.

PER CURIAM. In this case the testimony was taken in open court, and the judge has signed what purports to be a case setting forth the evidence. The appellees did not appear on the settlement of the case, and assign for reason that no notice of the time of settlement was given them. When return was made they moved in this case to dismiss on the ground that there was no case settled and signed by the circuit judge; but, as we were satisfied there had been an attempt to settle a case in good faith, and that appellees knew the fact at the time and might have appeared on the settlement, we denied the motion. They then moved to remand the record for the settlement of a proper case. As we are satisfied, from an inspection of the case the judge has signed, and which appellant has printed, that it would not enable us to review the case on all the evidence as the statute contemplates, we think this motion must be granted. At the same time, as we think the appellees are in fault in not appearing on the settlement before, and in leaving the appellant to go on and print the case as then settled, the order to remand will be subject to the understanding that on the final award of costs, whatever may be the result of the suit on the merits, the appellees will be charged with such costs as are made necessary by their neglect to move to have a proper case settled until after the appellant had been to the expense of printing the imperfect case.

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BENJAMIN BROWN v. JACOB KNAPP, TREASURER.

Right to inspect public records.

Mandamus lies to compel a county treasurer to permit the inspection of liquor bonds filed in his office.

Mandamus. Submitted June 10. Granted June 11.

Henry A. Chaney for relator.

Densmore J. Cramer for respondent.

SHERWOOD, J. The papers presented in this case show a most extraordinary proceeding on the part of the county treasurer. A member of the board of review of Ann Arbor,—who had been for the two previous years a supervisor in Washtenaw county,—on application to that officer for permission to inspect a liquor bond, is denied the privilege on the ground that the treasurer regards it as unnecessary for the purpose stated by the petitioner. It is not pretended that such purpose is an unlawful one, or that the request was not respectfully made.

The county treasurer holds a public office, and the statute requires the liquor bonds to be filed therein and to be kept by the treasurer. They thereby become public records, and as such may be examined and copies taken thereof, if desired, by any citizen. How. Stat. § 9347. There are many and very good reasons why citizens may and should have this right: 1st, as a citizen, to hold the board, whose duty it is to approve the bond, to public accountability for accepting insufficient bonds; 2d, to prosecute sureties criminally when they have falsely sworn to responsibility; 3d, to see if there is any sufficient security for any citizen, widow, child or parent who may have a right of action for violations of the license law (which frequently occur) against the liquor-seller and his sureties, and to see that they are not forged; 4th, as assessor

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or other tax officer, who may desire to compel parties who may have property, according to their oaths given on justification, to pay their share of the taxes; and for many other purposes which readily occur to any one who has given any attention to the subject.

It is no answer to say that the time has gone by for performing the official act by the person desiring the information sought, or that the purpose intended, in the judgment of the respondent, is not a commendable or proper one, so long as it is not criminal, when the inspection is desired. The law does not vest in the treasurer any such discretionary power to deprive the citizen of a substantial right given by the statute,—one in which he may have large pecuniary interests, and of which he may be deprived if the action of the treasurer in this case can be sustained, and the most beneficial object of the act under which the bond is given defeated.

City boards and other officers, whose duty it is to approve of these bonds, are held to a great extent to responsibility in taking proper security in this class of cases by a just public opinion, from which they cannot be permitted to shield themselves in the course pursued by this respondent. The real purpose of the statute is that perfectly safe bonds shall be taken for the protection of all parties, and this purpose must not be defeated by proceedings of the sort complained of in this case.

We are all of the opinion that the action taken by the treasurer in this case can find no support in law or right, and should not be sustained. If authority were needed upon the construction of the statute as we have given it, it will be found in *Ferry v. Williams* 41 N. J. L. 332: 19 Am. L. Reg. 154, which we fully approve. The request of the petitioner was a reasonable one, and it was the duty of the officer to comply with it when made.

The writ of mandamus must be granted as prayed, with costs against the respondent.

The other Justices concurred.

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BENJAMIN NEELY v. WILLIAM H. ROOD.

Misapplication of trust moneys—Recovery by owner.

1. One who has left moneys in trust in the hands of a person who has misapplied them, cannot recover them from the latter's assignee or from a third person unless he can substantially identify them in the hands of the person whom he seeks to charge.

2. Money deposited on general account and not left as a special deposit becomes the money of the bank, and the bank is then the depositor's debtor for the amount.

Error to Marquette. (Grant, J.) April 15.—June 18.

ASSUMPSIT. Plaintiff brings error. Affirmed.

F. O. Clark for appellant. If a party receive money from an agent in payment of an agent's debt, knowing that it belongs to the principal the latter may recover it back from such party in assumpsit: *Rusk v. Newell* 25 Ill. 226; *Beardsley v. Root* 11 Johns. 464; *Barclay v. Gooch* 2 Esp. 571; *Surtees v. Hubbard* 4 Esp. 203; *Floyd v. Day* 3 Mass. 403; *Denton v. Livingston* 9 Johns. 96; the trust is enforced against one who comes into possession of trust funds with notice of the trust relation: *Shibla v. Ely* 2 Halst. Ch. 184; *Compo v. Jackson Iron Co.* 49 Mich. 39; *Mechanics' Bank v. Seton* 1 Pet. 299, 309; *Weller v. Rolason* 17 N. J. Eq. 13; *Rusk v. Newell* 25 Ill. 226; as to what constitutes notice of a trust, see *Oliver v. Piatt* 3 How. 333; *Mason v. Waite* 17 Mass. 560; *Hall v. Marston* 17 Mass. 575; being once constituted a trust fund, it could not be changed by any act of the trustee: *Minor v. Rodgers* 16 Am. Rep. 69; and whosoever succeeds to the trust, is bound by the same rule; a trustee holding money in his hands must account for the same: *Hill v. Stevenson* 63 Me. 364.

E. E. Osborn for appellee.

CHAMPLIN, J. Plaintiff brought assumpsit, his declaration containing only the common counts. It appears that on the 31st day of December, 1881, plaintiff gave to one John E. Ward

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his check on the First National Bank of Marquette, Mich., for $469, payable to the order of John E. Ward, county treasurer, for the purpose of having Ward pay to the Auditor General, at Lansing, certain back taxes upon lands owned by plaintiff, amounting to $468.38. John E. Ward, at this time, was county treasurer of Marquette county, but the check was not received by him in his official capacity, nor was it any part of his official duty to pay such taxes. He kept a bank account at the First National Bank of Marquette, and also at the Lansing National Bank of Lansing. So far as appears, his undertaking to pay these taxes for Neely was wholly gratuitous. He had been in the habit of accommodating parties in this way, and kept a deposit in the Lansing National Bank for this purpose. When any one paid him money to pay back taxes he did not forward it to Lansing, but deposited it at Marquette, and would draw checks in favor of the auditor general on the Lansing National Bank. The funds deposited in this bank were made in this way: whenever he received, in the course of his business, any exchange on Chicago, New York or Detroit, he sent it to this bank at Lansing, and thus saved exchange between Marquette and Lansing. When he received the check from Neely he deposited it to his own credit in his account with the First National Bank of Marquette, and afterwards drew it out and applied the money to his own use. He never paid the taxes to the Auditor General. About a week prior to January 24, 1882, Ward discovered that he was a defaulter in his office of county treasurer. In this emergency he went to Mr. Wadsworth, one of his sureties on his official bond, to whom he made known his financial condition, and proposed to secure his sureties by transferring to them all his property. During the interview he informed Wadsworth that he had a balance in the bank at Lansing of about fifteen hundred dollars, and that parties had left with him about a thousand dollars for him to pay back taxes with, but did not mention Neely's name as being one of the number. This was on the 23d of January. On the 24th, the defendant, Rood, who was also one of his sureties, came

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to him with a request signed by all the sureties on his official bond, requesting him to make the transfer of his property to defendant Rood, for the purpose of protecting them against loss on account of his defalcation, which he proceeded to do without delay. At that time there was standing to his credit in the bank at Marquette about ninety-one dollars, and in the bank at Lansing $1423.44. He had made no remittances to the bank at Lansing after receiving the check from Neely, but had checked out some in the meantime. He drew checks in favor of Rood for the balances in both banks, but did not tell him that any of the money in the bank at Lansing was subject to the payment of any back taxes of Neely or other persons, and the jury found as a fact that Ward did not hold $469 on deposit in the Lansing bank for the purpose of paying Neely's back taxes, as the money given to him for that purpose by Neely.

Under these facts plaintiff claims that Ward held this $468.38 only in trust, and that he could not transfer title to it to Rood, but that he received it as the money of the plaintiff, and Rood is liable to him for money had and received, and that this action is brought upon that theory, and also upon the theory that it is immaterial whether it was the identical money given to Ward by plaintiff; that he could not transfer any money to Rood until the money he held in trust for others was provided for and set off. The infirmity of this position is that it assumes that Rood received the $468.38 which Neely placed in Ward's hands to pay his back taxes. The rule contended for is well settled, that where property, held upon any trust to keep, to use or invest in a particular way, is misapplied by the trustee, and converted into different property, or is sold and the proceeds are thus invested, the property can be followed wherever it can be traced through its transformations, and will be subject when found, in its new form, to the rights of the original owner or cestui que trust. *Cook v. Tullis* 18 Wall. 341.

But it is essential to the assertion of a beneficial title in a

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trust fund that it can be clearly traced into the hands of the party to be charged, though no more than proof of substantial identity is required. In this case the record shows that the money received by Ward on Neely's check was deposited by him in his general account in the First National Bank of Marquette. It was not placed there as a special deposit, and its identity was lost. It became the bank's money, and the bank became debtor to Ward for the amount. No subsequent appropriation of any of his money was ever made by Ward to pay Neely's taxes, and we are not called upon by this record to decide what effect such appropriation would have had if it had been made, and notice thereof brought to the knowledge of Rood. If, when assigning to Rood, the recent Bankrupt Law of the United States had been in force, which saved all trust property from passing to the assignee, Ward had been declared a bankrupt under that law, the money which he received of Neely and deposited in the bank would have vested in the assignee, and Neely could not have recovered it as a trust fund. Thus, in *Re Janeway* 4 N. B. R. 100, money was left with Janeway by Mary Ann and Margarette Cool to be invested for them. Instead of making the investment, he employed it, with his other means, in speculations. It was not claimed that it could be identified, and the court applied the rule as laid down in Hill on Trustees, that "where the trust property does not remain in specie, but has been made way with by the trustee, the cestui que trusts have no longer any specific remedy against any part of his estate in his bankruptcy or insolvency, but they must come in pari passu with the other creditors, and prove against the trustee's estate for the amount due them." So, in the *Robert Hosie's Case* 7 N. B. R. 601, Judge Longyear held that when money was sent to Hosie, who was a banker, for the express purpose of paying a certain note and mortgage, who entered it on his books to the credit of the person who sent it, and before the note and mortgage arrived at the bank to be paid, Hosie went voluntarily into bankruptcy, the party was not entitled to have the money so deposited repaid by the assignee, because

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it had become impossible to do so, the money having become part of the general assets of the bankrupt, and that he must take his chances with the general creditors. And in *Bank of Commerce v. Russell* 2 Dill. 215, which was a case where a bank sent notes to a banker for collection, which he collected and placed with his other funds, the court held that the identical money not having been kept separate and distinct from the banker's other money, it could not be recovered from the assignee as a trust fund. Had Ward not failed or made an assignment, and had refused to pay the taxes, Neely could not have maintained an action against the First National Bank of Marquette for money had and received, based upon this theory that the money deposited by Ward constituted a trust fund. Much less could he have maintained such action against the Lansing National Bank. And if he could not in their hands, it is manifest that he could not follow it through their hands into those of Rood, and recover it in an action for money had and received.

An examination of cases at law where money has passed from the hands of the bailee or trustee to whom it was intrusted, to a third person, will show that the reason for allowing a recovery in an action for money had and received is based upon the fact that such person had received the plaintiff's money under circumstances which showed that he had no right to retain it as against the plaintiff. Thus, in *Rusk v. Newell* 25 Ill. 226, cited on plaintiff's brief, Rusk sent money by Newell, to be by him delivered to plaintiff's agent to be applied to a specified purpose. Newell delivered the money to the agent and took his receipt. He then received from the agent the same money back in payment of a debt due him from the agent. Here the identical money came to the hands of the defendant. He knew it was plaintiff's money when he received it, and knew it was being misapplied when he received it from the agent to pay the agent's debt due to him. Another case cited on plaintiff's brief will suffice by way of illustration to show the principle upon which the action can be maintained; thus in *Mason v. Waite* 17 Mass. 558, plaintiff had sent a package of money

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by one Sargent, a stage driver, to be delivered in Boston. Defendant kept a gaming-house, and won the money from Sargent at a game of faro. Mr. Justice Parker said the identical money of plaintiff came to defendant's hands unlawfully, and that plaintiff could recover it from defendant in an action for money had and received.

In this case Ward received the money from the bank on Neely's check, and the same was placed by the bank to Ward's credit. He then drew checks on his account in the bank from time to time, until there remained due him from the bank about $91, and this indebtedness from the bank he transferred to Rood. The result of the whole proof is that plaintiff has wholly failed to trace Neely's money, or the avails of his money, or of the fund created by it, into the hands of Rood.

As the facts upon which the plaintiff's theory is based are not supported by the testimony in the case, it follows that the judgment of the circuit court must be affirmed.

The other Justices concurred.

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SANFORD BAKER v. WILLIAM MCARTHUR AND ARCHIBALD MCARTHUR.

Boundaries—Surveys and re-surveys—Proofs.

1. Two official surveys having resulted differently the question in ejectment was the real location of a section line. *Held*, proper to show that a surveyor who had helped to run the original line, had again run it in laying out village lots, while the corner-post and witness-trees were still standing; and that afterwards a grantee had built a fence along the line so run, and this fence was understood in the neighborhood to indicate that line.

2. A re survey was had when the evidences of the original survey had nearly disappeared, and a question afterwards arose as to where the true line was. The boundaries of property conveyed before the re-survey were not to be disturbed. *Held*, proper to show that lots had

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been laid out and buildings put up with reference to the line as established by the first survey, and that it had been shown by a recent survey that the line as run by the re-survey would cross lots and bisect buildings.

3. Disregard of the evidences furnished by fences, buildings and common repute, as to the true location of a surveyed line would justify granting a new trial in ejectment.

4. Old surveyed lines which have become uncertain are not to be superseded by new ones, but are to be ascertained by a re-survey, if rights have become fixed and regulated in reliance upon the common understanding as to where they lie.

Error to Cheboygan. (Ramsdell, J.) April 17.—June 18.

EJECTMENT. Defendants bring error. Affirmed.

Bell & Adams and *C. I. Walker* for appellants.

Humphrey & Perkins and *D. C. Holbrook* for appellee. A line may be fixed as a boundary by acquiescence and proof may be given tending to show acquiescence: *Dupont v. Starring* 42 Mich. 492; *Diehl v. Zanger* 39 Mich. 601; *Joyce v. Williams* 26 Mich. 332; *Smith v. Hamilton* 20 Mich. 433; *Stewart v. Carleton* 31 Mich. 270; *Van Den Brooks v. Correon* 48 Mich. 284: 3 Washb. R. P. 350; *Nixon v. Porter* 34 Miss. 697; in fixing a boundary it may be shown that a particular line would conflict with well-established lines: *Hobbs v. Outlaw* 6 Jones (N. C. L.) 174; the original survey governs and subsequent ones are only to find where the original lines were run and corners located: *Lindsey v. Hawes* 2 Black 554; *Britton v. Ferry* 14 Mich. 53; *Case v. Trapp* 49 Mich. 61; *Gregory v. Knight* 50 Mich. 63; *May v. Baskin* 20 Miss. 428; *Buel's Lessee v. Tuley* 4 McL. 268; *Robinson v. Moore* 4 McL. 279; *Thomas v. Patten* 13 Me. 329; *Hall v. Davis* 36 N. H. 569; *Ripley v. Berry* 5 Greenl. 24; *Norris v. Hamilton* 7 Watts 91; *M'Iver v. Walker* 4 Wheat. 445.

SHERWOOD, J. The plaintiff brought ejectment to recover a parcel of land, "commencing at a point on the west bank of the Cheboygan river twenty-five rods northerly along said river from the intersection of the south line of said section twenty-nine with said river; thence westerly and parallel to said south section line of said section twenty-nine to the

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west section line of said section twenty-nine; thence north along said section line three rods; thence east and parallel to said south section line to the Cheboygan river; thence southerly along said river three rods, more or less, to the place of beginning." The parcel lies in the village of Cheboygan, between Main street and the river, and about twenty feet on the former and thirty-six feet on the latter, and is the south-west part of the south-west fractional quarter of section twenty-nine, according to the original survey made by James H. Mullett, and which fractional quarter was entered by Jacob Sammons in March, 1846, and by him platted into village lots, and laid out into the village of Cheboygan in 1851. The village plat was surveyed and laid out by one Whicher, who assisted Mullett in making the survey of 1840.

It is admitted that the description purchased by Sammons of the government covered all of section twenty-nine west of the Cheboygan river; that it is in town thirty-eight north of range one west; that under the Mullett survey the corners of sections twenty-nine, thirty, thirty-one and thirty-two were marked, and a meander stake set up on the lake shore, and that said fractional quarter was represented on the survey plat as containing fourteen and 85-100 acres.

Both parties claim under common grantors. In 1855, under an order from the General Land-office, for some reason not appearing in the record, Harvey Mellon was instructed to make a re-survey of the township, but was not to make any changes in the Mullett survey where property had been previously sold; and was required to respect all corners made by Mullett when sales had been made. Mellon could find no evidence of the Mullett survey except the quarter stake and the meander stake set by Mullett on the lake shore. A plat of each of the surveys was introduced in evidence on the trial. The Mellon plat describes the fractional part west of the Cheboygan river as lot number three, and makes it contain twenty-five and 38-100 acres, instead of the amount stated in the Mullett plat. On the sixth of October, 1866, four persons, including the defendant William McArthur,

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conveyed to the plaintiff and one Patterson the south part of said lot three, (according to the Mellon survey,) it being twenty-eight rods on the Cheboygan river, and extending westerly the width across the whole of said lot. It is under this conveyance that the plaintiff seeks to recover, and it is admitted that the title to this piece of land described was in the plaintiff, the only question being as to the proper location,—where was the south line of this parcel?

It is substantially admitted that, if the Mullett survey is to control, the plaintiff must prevail; if not, then the defendants are entitled to a new trial. The south line of section twenty-nine, as established by the Mullett survey, thus becomes of great importance in the case. It appears by undisputed testimony that the Mellon south line was several rods south of the Mullett line, and the question finally narrowed down to the question, which line was intended when the conveyance was made. There was some evidence tending to show that a fence had for many years marked the Mullett line; and while the designation made was that contained in the Mellon survey, the Mullett boundaries were those really intended, and this fact went to the jury and their verdict is against the defendant. It only remains to ascertain whether any error was committed by the court in taking the testimony, and placing it before the jury with proper instructions.

We have examined the record carefully, and the assignments of error in detail, and are unable to discover any erroneous rulings or charges by the circuit judge. It is not claimed by the defendant that the Mellon survey was intended to or did carry the south line of the parcel in dispute south of the south line of section twenty-nine, or the east line of said parcel east of the east line of said section; and so long as such is the fact, it can make no difference whether the parcel is called "lot number three" or "the south-west part of the south-west fractional quarter of section twenty-nine." It is the south twenty-eight rods of the fraction that is in question.

It appears from the testimony that Whicher made a sur-

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vey of the south line of section twenty-nine when he laid out the village in 1851, and that in so doing he started from the corner of sections twenty-nine, thirty, thirty-one and thirty-two, and at the time the corner-post, with the witness trees as established by the Mullett survey, was standing; that very soon thereafter a fence was built by Sammons, who entered the land on said south line of section twenty-nine; and that it had always remained there. We think the testimony offered tending to show these facts was entirely competent and quite important. Whicher assisted in running the Mullett line between the section corner and the meander post on the lake shore, and ran it again himself when the village was laid out. We further think that the old fence placed upon that line when built was understood among the neighbors, who had always known it as indicating that line, and testimony of the fact was proper. In many cases it is the only evidence existing of original surveys.

It quite satisfactorily appears that buildings had been erected and lots laid off in the village of Cheboygan with reference to and regarding the south line of section twenty-nine as shown by the Mullett survey. Gen. Duffield had made a recent survey of the premises, from which it appears that said south line as Mellon ran it, and which the defendants claim to be the correct one, would cross village lots and pass through buildings erected upon them. This testimony was objected to as incompetent. We think the testimony was not subject to the objection taken. It is competent to prove that a line run in a particular place will disturb and conflict with ancient and well-established boundaries of other tracts, which necessarily determine the line to be ascertained, in order to repel the conclusion that the former is the true line in question.

It is clear that the south line of both the Mullett and Mellon surveys was the south line of section twenty-nine; and the only question of importance in the case, as we have said, was, where was this line? The former was fixed and established by stakes, witness trees, and other monuments, which existed, as the testimony shows, and were well known when

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the village of Cheboygan was platted and built up, and none of which could be found when the Mellon survey was made.

We think the jury were well supported in their finding upon the testimony, and that a different finding would have furnished good ground for the trial judge to have used his discretion in granting a new trial.

By the Mellon survey the south boundary line of section twenty-nine would be removed several rods south of the line where it has always been regarded as established, and by which rights of parties have been fixed and regulated for years. In such cases the old lines are to be ascertained by a resurvey, and not new ones established. The testimony in this case tends to show such to have been the object of the government in making the Mellon survey. It appears, however, this was not done, and when it is not, the mischief of unsettling boundaries which have been generally accepted and acted upon usually follows, and this is always to a greater or less extent injurious, and will not be looked upon with favor by the courts, whose duty it is to protect the rights of parties interested against the unlawful encroachments of parties claiming under such resurveys.

The charge of the court[1] in this case was well considered,

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[1] The court, in charging the jury, among other things, said:

1. In this action both parties claim under a common grantor. The plaintiff claims to have purchased of the grantor of the defendants a piece of land described as the south part of lot 3, in section 29, town 38 N., range 1 W., 28 rods front on the left bank of the Cheboygan river, and the same width westerly, across the whole of said lot, and claims that the defendants are occupying a strip about 36.30 feet on the river front, across the north end of the land thus described, and about 19.80 feet on Main street, Cheboygan village.

2. The defendants admit the title of the plaintiff to the land described in the deed, but deny that it covers a strip on the north 36.30 feet wide on the river, and 19.80 feet on Main street, occupied by them, or any other property occupied by them.

3. The rights of the parties must be determined by the location of the section line on the south side of section 29. To entitle the plaintiff to recover, he must prove to your satisfaction, by a clear preponderance of proof, that the section corner of 29, 30, 31 and 32 was at the point where he claims it to have been. In the absence of any satisfactory evidence of any monuments being established by the original survey, like a section-corner stake or meander stake, or if such stakes were established, and the plaintiff is unable to prove just where they were established, you will be governed by the courses and distances of the original survey in fixing the southern boundary of section 29.

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and covered all the legal points necessarily involved in the case, and we do not deem it necessary to consider further the questions raised in the charge and refusals to charge, as we are all satisfied no error was committed by the circuit judge.

The judgment must be affirmed.

The other Justices concurred.

THOMAS H. McGRAW v. GERMANIA FIRE INSURANCE COMPANY.

Fire insurance—Agency to obtain policy—Proofs of loss—Private examination on oath—Cancellation.

1. Where proofs of loss were made by an agent of the assured the latter, in a suit upon the policy, in which the proofs were introduced without objection was properly allowed to testify that he had given the agent authority to act in all respects as he himself would, with reference to the proofs.

2. Where a fire insurance policy requires proofs of loss to be made out

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108	104	
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54	145	
s19NW	927	
129	323	
54	145	
s19NW	927	
130	2566	
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s19NW	927	
132	227	
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4. To establish his claim the plaintiff has introduced testimony for the purpose of showing where the original section corner established by Mullett in the first survey was located. If the line established by Mullett in his first survey can be determined by you, that line will determine the right of the parties in this case. If you find from the evidence in this case that the Mullett line drawn from the quarter post between sections 30 and 31 east to the river bank strikes at the point claimed as the point where a meander post stands, and its course intersects a point claimed as the section corner, then the plaintiff will recover.

5. The question of whether the Mullett line was run at all or not has been raised by the defense in this case, and it is for you to consider. The field-notes, the minutes and plats of government surveyors, as returned by them to the land department, are evidence of the surveys having been made, but they are not conclusive evidence of that fact, and if upon an examination monuments are generally found wanting, as described in the field-notes, it casts a suspicion upon the accuracy of the field-notes, or the truthfulness of the return of the government surveyor. You will determine from the evidence in this case, as it has been presented to you, whether or not a line was ever surveyed through here by the original surveyor, and if you find that there was no such line ever surveyed by him, then, for the purpose of this case, the Mellon line will prevail, and in that case the plaintiff could not recover; but if you find that there was a line surveyed through here by the original surveyor,

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and sworn to by the assured before he can realize upon the policy, such proofs are a condition precedent; and *it seems* that the assured must make them out himself or show good reason for not doing so and for leaving them to be made out by an agent. And in a suit upon the policy the plaintiff has the burden of proof that the case is within the exceptions to the rule which requires the proofs to be made out by the person assured.

3. A ruling is presumed to have been supported by evidence if all the evidence does not appear in the record.

4. A stipulation in a fire insurance policy that the assured, in case of loss, shall, *if required*, submit to a private examination, is, if valid at all, so clearly opposed to the general policy of the law that no intendments will be made in pursuance of it; and where the assured person or his agent was notified that the company *desired* such an examination the letter containing such notification was properly excluded from evidence, as it was not in strict accordance with the stipulation.

5. Testimony as to what was done with reference to cancelling a fire insurance policy was properly excluded in an action on the policy where the premium was not returned until the loss actually occurred.

6. A person applied for insurance to certain agents. The latter could not place the whole amount in companies which they themselves rep-

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Mullett, then you will undertake to find from the evidence in this case where that line ran.

6. It appears that in the year 1851, some 11 years after the original survey, a man by the name of Whicher made a survey and laid out a village plat, and it is claimed on the part of the plaintiff that that survey, having been made at an early day, and so shortly after the government surveyor had completed his work, such plat should have greater weight with you than that of any subsequent surveyor. If you find that at the time the Whicher survey was made these government monuments existed, or that at that time there were a greater number of government monuments and marks than there were at the time the subsequent surveys were made, then it may be entitled to have greater weight with you; but if no more monuments existed at that time than at the time of the subsequent survey, then its antiquity will give it no greater weight than that of the subsequent survey.

7. It is claimed on the part of the defense that in the absence of any monument, as section corners or meander stakes upon this line, then that the true method of finding the line is to commence west at the corner between sections 31 and 30, running the line to the quarter post, which is an established monument, taking that course and then projecting that line past the east line of section 31, would form the line, the southern boundary of section 29; that it would be established. In this view of the case I do not fully accord, and while you will take that into consideration as to whether or not that line should be projected in that manner, yet lines are so frequently changed in direction from one government monument to another, that it is not conclusive evidence as to where the Mullett line was run.

8. It is also claimed on the part of the defense that in the absence of any monument being found, and in the absence of your being able to determine where those monuments were originally located, then a line

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resented, and went therefore to another agent from whom they obtained the rest, making certain verbal representations to him as to the condition of the property to be insured. The assured had nothing to do with these negotiations. *Held*, in an action on a policy thus obtained at second hand, that the persons obtaining it were agents of the insurer rather than of the assured, and that their verbal representations, if false, could not avoid the policy.

7. Where the effect of a written contract will depend upon contemporaneous verbal representations made by a third person, he must be an actual agent or his action must be ratified with knowledge of what he has done.

Error to Bay. (Green, J.) April 22.—June 18.

Assumpsit. Defendant brings error. Affirmed.

Hanchett & Stark for appellant.

Isaac Marston for appellee.

Campbell, J. So far as the questions raised in the record refer to the proofs of loss, and the attempt at cancellation, we

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drawn from the known monument west the quarter stake between 30 and 31, to the section corner between 25 and 36 on the east line of the township, would form the true line bounding the south of section 29. This would be but to magnify the possible errors that I have mentioned that might occur in running the line in accordance with the direction of the section corner on the west to the quarter post, and would not be a safe guide to go by.

9. The statute prescribes the manner in which lost interior corners should be found. In this case none of the surveys conformed to the requirements of the statute in finding these corners.

10. The section corner in question may be determined by the evidence of men who knew where that section corner was; but in determining whether they knew the fact as to where the section corner was, you will take into consideration their means of knowledge, the length of time that has transpired since they observed it, and their liability to be mistaken as to the true section corner, where two corners have been established, one the original and the other the re-survey.

11. It is claimed on the part of the plaintiff that the defendants having platted a portion of the village of Cheboygan upon the lines surveyed by Whicher, is evidence to be considered by you that the Whicher line is the true section line as surveyed by Mullett. Upon this point, gentlemen of the jury, I charge you that the platting of the village of Cheboygan by these parties does in no way govern or control the rights of these parties in this suit, as it does not affect the property in question.

12. If you find that the section line of Mullett is on a line with what is claimed is the meander post on the margin of the Cheboygan river, the plaintiff is entitled to recover.

13. The question for you to determine in this case is, where was the Mullett line, if such a line was ever run; and where that is found, the rights of the parties in this case are determined by you.

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concur in the results arrived at by Judge Champlin, that there is no error. But we think there is no error in the rulings depending on the supposed agency of the firm of Knaggs, Clark & Plum, under which the court below properly, as we think, excluded any responsibility against McGraw for what they may have done or omitted.

It is certainly worthy of some consideration how far those questions could be raised at all under the facts as shown by defendant. The policy in suit, if valid, covered a loss under a previous fire to the one now in question. The defendant's agent, Mr. Stringham, examined the property and risks, and advised the company, who determined and attempted, not to repudiate the entire policy, but to cancel what was left of it; and the various notices which they gave, and the steps which they took, were inconsistent with any claim of its invalidity. If they proposed to repudiate, they could not treat it as good so far as premiums were concerned, and bad as to liability. It does not appear, but the inference is otherwise, that the first loss was treated as not binding defendant. The premium offered to be returned was only a portion of that paid for the whole period. Such a transaction would seem to be an affirmance, as far at it is significant at all; and there was never any attempt at rescission. But, as we do not know how far this matter may have been viewed below, we do not propose to do more than refer to it as an element which might have been significant if the other rulings were doubtful.

But so far as the relations of McGraw with Knaggs, Clark & Plum become important, we do not think they involved such agency as defendant claims. The testimony tended, in our opinion, to prove distinctly that as between McGraw and that firm they represented the insurers and not him. He, by his agent, applied to them for insurance, and in answer to that application obtained the insurance. He paid them all the premiums required on all the policies, and they receipted for the whole in one receipt, and without other discrimination than separating the items belonging to the several policies. He did not become responsible for their compensation. There was nothing tending to show that any one but Mr. Curtiss and

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Mr. Birdsall had authority to represent him. From the business in which this firm was engaged no one would have a right to suppose that they could possibly have personal knowledge of the exact condition of all property that they got insured, or that any policy valid on its face could be fairly charged with their failures in representations. If the policy in suit had been issued on written representations, those would no doubt have formed a part of it, if referred to, and there could then have been no ambiguity about the contract. But where the effect of a written contract is made to depend—if this can legally be done in all cases—upon contemporaneous verbal representations, those must, in our opinion, be made by an actual agent, or one whose action is ratified with knowledge of what he has done. We can see no good reason in law for applying to insurance business any different rules of agency from those which apply elsewhere. No one could contend that these persons were McGraw's agents in those insurances which were obtained from their own companies, although insurance policies sometimes attempt to put their agencies in this anomalous position, as binding the insured in all cases where their conduct might prejudice him, and only representing the company where it will benefit the company.

The companies always have it in their power to have everything material reduced to writing. It is contrary to general practice in other cases to have an agreement partly in writing and partly in parol. If this can lawfully be done, as perhaps it may be, it must nevertheless stand as written, unless varied by authority, and an assured party is not bound to inquire how far unauthorized persons have undertaken to represent him in matters of which he has no notice. The policy refers to property fully identified. He could not be bound to assume or imagine that anything further had been represented about it, except by his own agents, of whose acts he is bound to inform himself. No one would be safe in taking out insurance under any other rule. The insured has a right to know where he stands, and while he takes the risk of his own representatives, he cannot be subjected to those of persons whom he has never appointed or recognized.

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If we thought there was anything tending to show that Clark and his firm were plaintiff's agents, we could not pass upon the weight of testimony; but we think there is nothing from which any such inference could be raised.

The judgment must be affirmed.

COOLEY, C. J. and SHERWOOD, J. concurred.

CHAMPLIN, J. (dissenting). This is an action of assumpsit brought by plaintiff to recover damages upon a policy of insurance.

On the 21st of April, 1882, the plaintiff and one Charles Wartrous were copartners, composing the firm of T. H. McGraw & Co., which firm were the owners of some eighteen million feet of pine saw-logs, then cut and skidded in Bay county, Michigan. The firm had in their employment one Charles C. Curtiss, who was the superintendent of T. H. McGraw & Co. in looking after their affairs generally, and had entire charge of their insurance business. The partners resided in the state of New York, but they had a place of business and an office at Portsmouth, in Bay county, Michigan.

About the 21st of April, 1882, Curtiss called upon Messrs. Knaggs, Clark & Plum, a firm of insurance agents in Bay City, and requested insurance for T. H. McGraw & Co. upon their saw-logs to the amount of one hundred thousand dollars. They informed him that they did not know what amount they could take, but would write to their companies and ascertain, and take what they could. The Hanover Fire Insurance Company and the Germania Fire Insurance Company were doing business in this State, and were insuring property against loss or damage by fire under what they denominated "Underwriters Policy," and they had an agency at Bay City, and were represented there by Daniel Shannon. The firm of Knaggs, Clark & Plum did not represent the Underwriters, but they applied to Shannon and placed a portion of the risk applied for by T. H. McGraw & Co., through Curtiss, in companies represented by Shannon; and they afterwards delivered

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to T. H. McGraw & Co. policies of insurance upon their logs to the amount of fifty thousand dollars, of which the policy in suit was one. Curtiss had no dealings whatever with Shannon, with reference to the issuing of the policy or the risk covered thereby. He paid Messrs. Knaggs, Clark & Plum the premium upon all the policies received from them, including the policy in suit; and at or previous to applying for the insurance he made no written application, and made no verbal representations, as to the exposure or risk to fire of the property insured.

On May 6, 1882, a fire occurred which burned a portion of the logs. Notice was given to the companies of the loss, and adjusters were sent, representing all the companies, defendant included, to adjust the loss, and the adjuster representing the defendant company made out and forwarded to his company proofs of such loss.

On May 9, 1882, Wartrous sold his interest in the firm of T. H. McGraw & Co. to his copartner; and on the 24th of the same month Daniel Shannon, the agent of the Underwriters, indorsed the following consent upon the policy in question, viz.: "The insurance companies within named hereby consent that the interest of Thomas H. McGraw & Co., in the within policy, be assigned to Thomas H. McGraw, subject to all the terms and conditions therein mentioned and set forth." On the same day Curtiss signed the firm name of T. H. McGraw & Co. to the indorsement on the policy, as follows: "For value received, we hereby assign, transfer and set over to Thomas H. McGraw all our right, title and interest in and to the within policy, and all benefit and advantage to be derived therefrom."

The defendant sent Joseph H. Stringham to ascertain the amount of the loss occasioned by the fire of May 6th. He adjusted the loss for defendant, and made report thereof to the state agent of defendant on the 20th or 21st of May. He testified that there was a great deal of forest exposure; that it was right in the woods where the logs were skidded; that there had been timber cut away more or less, and that there was a great deal of exposure all around; that there was

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stuff lying around on each side of the road that would feed a fire, very close to the logs; that it was cleared away a little more around the logs than it was elsewhere, but the space was not wide enough to furnish protection; and that he knew nothing at that time of the circumstances under which the insurance had been obtained; that the surrounding forest exposure very greatly affected the risk. And it appeared from the evidence of Charles C. Gardner that no clearing around the skidways had been done prior to the 30th of April, and that before then the ground was in its natural condition as woods around the skidways, with the leaves, bark and refuse stuff upon the ground.

It appears that on May 29th the defendant telegraphed to its agent Shannon to cancel the policy in question, and that Shannon went to plaintiff's office and saw Curtiss, and told him he wished to pay the losses for the companies represented by him except the Underwriters, and made an appointment to meet Curtiss at Shannon's office; that a little after 11 o'clock A. M. they met, and Shannon then showed Curtiss the telegram, and told him that the Underwriters had ordered him to cancel the policy; that it would facilitate matters to cancel the policy over his counter; but as the business had been placed through Knaggs, Clark & Plum through courtesy, he would go to them and have the policy canceled; that Curtiss replied that he thought it was all right,—he would hold the policies for the present.

On the same day, Shannon computed the amount of the unearned premiums upon this policy and others, and wrote and delivered to one of the firm of Knaggs, Clark & Plum a letter requesting them to cancel the policy in suit, with others, and in this letter he stated that he inclosed a check for the return premiums, but the check was not inclosed. When the letter was delivered to Mr. Clark, of the firm of Knaggs, Clark & Plum, he was told that the check was not inclosed, but if he would call at Shannon's office in the course of an hour he would receive the currency, which he promised to do, but did not do so. On the 30th of May, Shannon made several efforts to see some member of the

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firm of Knaggs, Clark & Plum, for the purpose of paying the return premium, but it being a legal holiday, commonly called "Decoration Day," he failed to find them at their office.

On the 29th of May a fire started about forty rods from any of the logs covered by the policies of insurance, and spread over the ground until it reached the logs, which it did on the afternoon of May 30th, running through pine tops, brush and refuse upon the ground where the timber had been cut. There was refuse stuff upon the ground which fed the fire right up to the logs, and ran along the railroad track for a mile and a half, where the logs were piled, burning that distance over the ground, and as it passed along it caught in the logs at the different rollways, and burned them. The prevailing timber in the woods, in which the logs were skidded, besides pine, were oak, ash, cedar and hemlock. Timber had been cut in lumbering all through the woods in the immediate neighborhood of the skidded logs, and around where they were skidded, leaving the tree-tops on the ground, except what had been cleared away around the skidways, from sixty to a hundred feet, and the clearing of this distance was not much protection if the fire got burning. The fire became very large, and covered a territory of two miles in length and a mile in width, and burned the logs in four places, from one-half to three-fourths of a mile apart. From the 6th of May to the 30th, fires had been burning in the neighborhood of the logs all the time, and the men had been fighting such fires all the time. Fires had occurred as early as the 26th of April, and had burned some of the logs; and from the 26th of April to the 30th of May fires were burning continuously. The fire of May 30th occasioned a large loss to the property insured, and notice thereof was given to the agent of defendant on the morning of the 31st, and afterwards proofs of loss were prepared and sent to the general agent of defendant at New York on the 17th of July. These proofs were sworn to by one Birdsall, whom the plaintiff authorized to prepare proofs of loss, and to verify the same.

On or about the 8th day of August, one R. H. Garrigue,

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an agent of the defendant company, and one Gould, an attorney of the company, came to Bay City, and wrote and addressed to T. H. McGraw & Co., at Portsmouth, Michigan, a letter, which he caused to be delivered at Mr. McGraw's office (plaintiff lived at Poughkeepsie, New York, but had a business office at Portsmouth); that, following the delivery of the letter, Mr. Curtiss appeared at the room designated in the Fraser House, with the letter, and an interview there occurred between Mr. Curtiss, Mr. Garrigue, and Mr. Gould. At this interview the proofs of loss were present, and in the conversation one of the parties told Mr. Curtiss "that those proofs were unsatisfactory; that in fact they were not proofs, because they were not signed and sworn to by the assured." They did not return the proofs to Mr. Curtiss for the purpose of having them corrected in that respect, nor offer to return them, but took them away when they went. No other objection was ever made to the proof. The loss not having been paid, suit was brought against the company upon the policy, the action tried, and verdict rendered for the plaintiff.

Upon the trial the plaintiff testified in his own behalf, and was asked the following question: "What did you say, if anything, to Mr. Birdsall with reference to those proofs of loss before leaving?" This was objected to by defendant's counsel as immaterial. The objection was overruled and the witness testified: "I gave Mr. Birdsall the authority to act in all respects as I would do if I were to remain, in connection with this insurance matter." The proofs of loss had been introduced in evidence without objection, signed by Thomas H. McGraw, by Ben Birdsall, his attorney, and were verified by him; and the evident object of the question was to show that the act was done by plaintiff's authority. The evidence called for was material, and the ruling proper.

The record discloses the fact that the plaintiff was at Bay City both at the fire of May 6th and May 30th, and that he gave no notice to any insurance agents himself, and that he was not here at the time the proofs of loss were made out.

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The proofs of loss themselves do not disclose any reason why they were not signed and sworn to by the assured. The clause in the policy referring to this matter reads as follows: "The assured shall forthwith give notice of said loss to the companies through their general agent, in the city of New York, and, as soon after as possible, render a particular account of such loss, signed and sworn to by them," etc. Based upon this clause of the policy the defendant's counsel requested the court to charge the jury as follows:

"The policy requires the plaintiff, Thomas H. McGraw, to make out in writing proofs of his loss, and sign and swear to them himself, and send or deliver them to the defendant; and if he fails to do that he cannot recover from the defendant. In case the plaintiff has failed to show that he made and furnished to the defendant such proofs of loss in regard to the second fire, for that reason he would not be entitled to any recovery on account of the second fire."

Under the policy in question, proofs of loss required by its terms are a condition precedent to a right of recovery; and in general they are to be signed and sworn to by the assured in person. But the clause in question is subject to exceptions; as where the owner is a non-resident, dead, or was insane or absent at the time when the loss occurred, and did not return in season to make the proofs, or did not possess the necessary information in reference to the matters required to be stated, to make proofs, or that the objection as to their being made by the wrong person has been waived. See Wood on Insurance § 413. But where the assured can himself make the necessary proofs he should do so, or give a sufficient excuse for his failure; and ordinarily (though this is not essential) the reasons why the proofs were not made by the assured should be stated in the proofs of loss.

The first inquiry presented is, does the present case come within any of the exceptions which authorize the proofs to be made by any other person than the assured? In such case the burden of proof is upon the plaintiff. The record discloses the fact that the plaintiff is a non-resident of the State; that he has a place of business at Portsmouth, near Bay City,

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Michigan; and that his business is carried on through Mr. Curtiss, his superintendent there. The insurance was obtained through his agent, and proofs of loss were made by another agent, expressly authorized. But the record fails to disclose any sufficient reason why the plaintiff did not make the proofs, or why Birdsall was the proper person to make them; and if the record contained the whole evidence upon this point I should have no hesitation in saying that this condition precedent of the policy had not been complied with. The record, however, does not purport to give the whole testimony upon the whole case or any branch of it, and counsel for plaintiff invokes the well-settled rule of this Court, that the presumption is that the ruling of the court below was correct, and that there was evidence to sustain it. *Wicks v. Ross* 37 Mich. 464; *Hall v. Johnson* 41 Mich. 286; *Brong v. Brown* 42 Mich. 119; *Cummins v. People* 42 Mich. 142. It must therefore be presumed that it was made to appear at the trial that the proofs of loss were properly made by the agent of the assured. Counsel for defendant calls attention to the fact that in the interview of August 8th, between the State agent of defendants and Mr. Curtiss, he was informed that the proofs were not sworn to by McGraw, and that they were not satisfactory, and were not proofs. But the position then assumed by the State agent was based upon the literal reading of the policy, and recognized no exceptions, whereas within the terms of the policy and intention of the parties, the clause in question includes under particular circumstances other persons than the assured, within the spirit of its provisions, as proper parties to make the required proof; and as before stated, the evidence at the trial is presumed in support of the charge and verdict to have satisfactorily established the validity of the proofs made.

R. H. Garrigue testified in behalf of defendant that he was defendant's state agent for Michigan, and came to Bay City on the 6th or 7th of August, and wrote to Thomas H. McGraw or Thomas H. McGraw & Co., at Portsmouth, Michigan, from room 78, Fraser House, and sent it to Mr. McGraw's office

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at Portsmouth; that Mr. Curtiss responded to the letter, coming to room 78, and brought the letter with him; that Mr. Gould was present in the room at the same time. The letter was offered in evidence by defendant's counsel. It reads as follows:

"BAY CITY, MICH., August 8th, 1882.

T. H. McGraw & Co., Bay City, Mich.—DEAR SIRS: As a further answer to your letter of July 28th, not included in my letter to you of August 1st, I would say that I am instructed by the general agent of the Germania and Hanover Fire Insurance Companies not to admit any liability under policy 20,300, nor waive any of the companies' rights under the terms and conditions of said policy, but to investigate all the facts in the case, and report to him, when he will submit the same to the board of management for their action. The companies have requested Mr. Geo. D. Gould to examine you under oath, or some person authorized to give answers for you.

The companies also desire a statement from your agents and brokers, Messrs. Knaggs, Clark & Plum, in relation to procuring the insurance. Please inform me at room No. 78, Fraser House, this city, when you can appear for such examination.

Yours truly, R. H. GARRIGUE, State Agent."

The offer was made for the purpose of showing the steps taken to obtain an examination of Mr. McGraw under oath. Counsel for plaintiff objected to its reception for the reason that it stated no time or place, and it did not appear that it ever came to Mr. McGraw's knowledge. The court sustained the objection and excluded the letter.

It was stipulated in the policy that the assured should, if required, submit to an examination under oath apart from all other persons except the attesting magistrate or notary, by any person appointed by the companies, and if deemed necessary by the companies, to a second examination, and subscribe to such examination when reduced to writing. By another clause of the policy it was provided that until such examination was permitted the loss should not be payable.

The provision for an examination apart from all other persons except the attesting magistrate is very unusual and

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extraordinary, and one liable to abuse, and to give to the insurers an unfair advantage. It is very questionable, indeed, whether such a stipulation is not void as against public policy. It certainly is antagonistic to the policy of our laws relating to contracts of insurance, and to proceedings of a judicial nature. The policy of our laws relating to the contract of insurance is to place the parties thereto upon an equal footing with respect to the assertion and determination of rights under it, and to secure fairness and equity between the insurers and the assured. Act No. 149 of 1881. It does not partake of the quality of fairness or equity to compel the assured to submit himself to an ex-parte secret examination, deprived of the aid of counsel to see that the rights of the assured are not jeoparded, or be led into making admissions or statements which he did not intend to make, or which, from the manner in which they are drawn out, fail to express the facts in their true light. The examination is to be had before a magistrate or notary; and although the proceeding is not in a strict sense judicial, yet it is quasi judicial in its nature. An oath is administered by a person having authority to administer oaths; the statements are reduced to writing, and are to be subscribed by him. They thereby become the sworn admissions of the party, and as such are admissible as evidence against him. In the secret chamber where the examination is carried on he may claim that his statements are not correctly written down, or that he has made statements qualifying those written down which the magistrate has failed to note, and he may object to sign such as are written. He is there surrounded only by the magistrate and agents of the company as the only witnesses he can produce of what occurred in their presence. It is true that the party may go upon the witness stand at the time of trial and contradict the statements, or swear he never made them, and the manner in which the statements were obtained, and the credit which should be given to them will be for the jury to determine; but if between the time of such examination and trial the person examined should die, there could be no explanation or contradiction. The sittings of all courts

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in this State are required to be public, and it is the privilege of any citizen freely to attend the same. How. Stat. § 7244. The law allows the depositions of witnesses in the State to be taken, to be used in suits in this State, but it requires notice to the adverse party, and the oath must be publicly administered to the witness. How. Stat. §§ 7434, 7439. The law also provides for the taking of depositions to be used in the trial of causes, but only upon notice to the adverse party, whose privilege it is to be present and cross-examine if he chooses to do so. How. Stat. § 7459 et seq. Provision in this statute is also made for taking and perpetuating testimony before suit is commenced, and under this provision defendant might have examined the party or any witness it desired, but such examination under the law must be public and upon notice. How. Stat. §§ 7476, 7477. The act of March 17, 1881, (Pub. Acts 1881, No. 36,) authorized any justice of the peace to issue subpœnas to compel the attendance of witnesses before the president, etc., of mutual fire insurance companies organized under the laws of this State, and to give evidence before them touching the adjustment or arbitration of losses; but notice to the opposite party interested in such adjustment, of the time and place of such examination, was required to be given, and he could appear either in person or by attorney and cross-examine the witnesses. Hence it appears that the policy of the law favors public proceedings in matters of examinations partaking of the nature of judicial inquiry.

But while I do not feel called upon to declare the stipulation void for the reasons suggested, the party seeking to enforce such extraordinary provisions as a defense to an action upon the contract, must bring himself within the strict letter of the clause relied on. The requirement ought to be so definite in its terms, and certain as to time and place for the party to appear, as to put the assured in default if he failed or neglected to comply. But it is not contended by the counsel for defendant that the letter alone would have been sufficient to bar plaintiff's right of recovery, and counsel avowed his object in offering it to be to show the steps

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taken to obtain an examination of Mr. McGraw under oath. If the writing and sending this letter was the only step taken, it was wholly immaterial, and counsel made no proposition or effort to show any other steps taken in that direction, except to show what was said in the interview between the agents of defendants and Mr. Curtiss at the Fraser House, when he appeared in response to the letter, in which interview it is claimed Mr. Curtiss was informed of the desire of the company to examine Mr. McGraw, and if he could not be examined, to examine Mr. Curtiss in his place. I do not think the contents of the letter tended to throw any light upon a substantive requirement or demand that Mr. McGraw should submit himself to a personal examination. In itself, it was insufficient for the purpose of a demand upon which to base a claim that plaintiff had not a right of action upon the contract until he did submit to be examined; and if not sufficient for that purpose, it was not admissible for any other.

The defendant had been permitted to show a letter had been written to T. H. McGraw & Co. and delivered at their office in Portsmouth, and that Mr. Curtiss appeared at room 78, Fraser House, in response thereto. This was sufficient to lead up to the interview with Mr. Curtiss. The letter was rightly excluded; and thereupon counsel for defendant put to the witness Garrigue this question: "I renew my question as to what took place between you and Mr. Curtiss at that time in regard to the examination of Mr. McGraw under oath in regard to this insurance?" which was objected to as wholly immaterial. Counsel for defendant thereupon announced: "The purpose is to show the interview between the witness and Mr. Curtiss in which Mr. Curtiss was informed of the desire of the company to examine Mr. McGraw, and if he could not be examined then to examine Mr. Curtiss in his place." He also stated that he claimed the right to the examination under the policy.

Under the proposition of counsel the question was subject to the same criticism as the letter. It was not proposed to show a requisition or demand that the assured submit to an

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examination, but simply the desire of the company therefor. The agreement was not that the assured would submit to an examination if desired, but if required. Under the view I take of the extraordinary character of this stipulation, and the doubts I entertain respecting its validity, I think the offer should not be extended by intendment to embrace what the strict letter of the contract requires. The court was right in excluding the testimony under the offer as made, and in refusing the defendant's fifth request to charge the jury, based thereon.

Daniel Shannon was produced and sworn as a witness for defendant, and testified that he resided in Bay City, and was the agent of the Germania Insurance Company and the Hanover Fire Insurance Company, the Underwriters' companies, in April and May, 1882. That he issued the Underwriters policy put in evidence in this case; that it was signed by him as agent at or about this date; that J. W. Knaggs, of the firm of Knaggs, Clark & Plum, applied to him for the insurance on the 21st day of April; that at that time he, the witness, had no knowledge of the risk of the logs in question, or of their situation personally; that Mr. Knaggs described the logs and the risk to him; that he, the witness, had no knowledge aside from the information obtained from Mr. Knaggs; that he did not go to the woods at all.

The defendant's counsel thereupon asked the witness the following question: "What representations were made to you by Mr. Knaggs in regard to the risk, and the situation and exposure?" The defendant's counsel offered to show that Knaggs then stated that there was no forest exposure; that the logs were then skidded upon ground which had been burned over the year before, and were in a clearing, and there was no forest exposure around them except occasionally a scrub oak; and in reliance upon that representation Mr. Shannon made the insurance, and that the representations were false. The question was objected to. The defendant's counsel claimed that under the facts testified to by Curtiss, Mr. Knaggs did act as the agent of T. H.

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McGraw & Co. in procuring this insurance; and so acting, any representations which he made affecting the insurance were the representations of McGraw & Co. The evidence showed, as appears from the record before us, that this policy of insurance was obtained in this manner: Curtiss had entire charge of T. H. McGraw & Co.'s insurance matters; that he applied to a firm of insurance agents at Bay City for $100,000 of insurance on the logs insured; that they said to him they did not know what amount they could take, but would write to their companies and ascertain, and take what they could. The insurance was furnished to the amount of $50,000 in twelve different companies; more than one half of the amount, or $27,500, having been obtained through the companies represented as agent by the witness Shannon, viz.: in the Underwriters for $15,000, Lion for $5000, Amazon for $2500, Metropole for $2500, St. Paul for $2500. Curtiss received these policies from Knaggs, Clark & Plum, and observed that they were countersigned by Shannon as agent at Bay City, and not by Knaggs, Clark & Plum; that when he made the application to them for insurance he did not know what companies they represented; that he knew some, but not all, and did not inquire of them; that he paid Knaggs, Clark & Plum for the whole amount of the premiums on the insurance; that after the fire of May 6th he reported the loss to Knaggs, Clark & Plum, and asked Shannon if it was necessary for him to report to the companies for which he had written policies. Knaggs applied to Shannon for the insurance, and aside from information obtained from him, Shannon had no knowledge or information on the subject of the risk.

I think there was sufficient evidence to submit the question of fact to the jury to determine whether Knaggs, Clark & Plum were the agents of the insured in obtaining the policy from the Underwriters. It was well said on the argument that they were not themselves insurers, and were not applied to as such. They were not applied to as agents of any companies. They were applied to as persons by whom insurance might be obtained. While the evidence shows

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that they acted as agents for some companies, such companies were not all known to Curtiss, and his application was not limited to them. His application was for $100,000 of insurance, without reference to the companies which should take it. When the policies were delivered they showed upon their face that the insurance was in companies of which they were agents, and in companies in which they were not agents. The plaintiff had acted upon the policies, and had made and forwarded proofs of loss from the fire of May 6th.

All inferences from these facts were to be drawn by the jury, under proper instructions from the court; and it was competent for them to find from the evidence that Knaggs, Clark & Plum were agents of the assured in procuring the insurance in the companies represented by Shannon as agent. If they were such agents, the representations made by them in procuring the policies, as to the situation of the property and the risk involved, were binding upon the plaintiff, although no express authority was given to them to make such representations, because, by giving them authority to procure the insurance, he must be held to have given them power to do any act necessary to obtain such insurance.

It is contended by defendant's counsel that Knaggs did, in fact, act as the agent of Thomas H. McGraw & Co. in procuring this insurance; that he made representations in their behalf by means of which the insurance was obtained; that those representations were false and fraudulent, making the policy void when it was delivered to him, and when he delivered it to Thomas H. McGraw & Co., they, by accepting it, ratified his agency in procuring it; that they could not ratify his act in procuring it separate from the means by which it was procured, and make it a valid policy; that the law does not allow them to adopt what he procured by fraud and was favorable to them, and to repudiate the fraud; and that it was competent as against them, when they sought to enforce the policy, to show that it was procured by fraud, and was void.

On the other hand, it is contended by counsel for plaintiff that Mr. Curtiss did not know until after the delivery of the

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policies that any application had been or was to be made to Shannon to write policies; that it does not appear that he gave Knaggs any authority to apply to any other agent; that on accepting the policies he continued to deal with Knaggs, Clark & Plum, and not at all with Shannon; that it was not claimed that at the time of accepting the policy, or up to the time of the fire, Mr. Curtiss was in any way informed that any representations had been made by Mr. Knaggs to Shannon at the time he made application for this policy. Plaintiff admits that by accepting the policy issued by Shannon he ratified the procuring thereof, so it was binding on the company, but that it would not extend beyond the fact of authority to procure a valid policy; that it would not be a ratification of each and every act done or statement made by Knaggs to procure it, unless knowledge thereof was brought home to the principal, who would have no right to assume that false and fraudulent statements had been made, and he cannot, therefore, be presumed to ratify what, so far as he can be charged with knowledge, never took place; that the whole doctrine of ratification is based on an act done *upon full knowledge of the facts.* And counsel for plaintiff admits that the principal cannot ratify a part and reject a part is familiar doctrine, but insists that in this case the only ratification is the taking and retaining the policy, with no knowledge of the alleged representations until after the loss; and that a principal ratifying that which was within the range of his intended instructions, does not ratify acts on the part of his agent of which he is not informed.

I think the principle which should control this case is well stated by Mr. Justice Redfield in *Fitzsimmons v. Joslin* 21 Vt., at page 142. After reviewing the English authorities upon the subject, he says: "The cases must revert and can only find secure repose upon the old basis, that a contract superinduced by substantial fraud entering into the very basis and frame-work of the contract, and without which it would not have been made, cannot be enforced against the party thus misled, whether the fraud originated with the other party, or

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his agent,—whether it were concerted by the principal, or adopted by him."

This principle is fully supported by the following authorities: Kerr on Fraud 111–114; *Baker v. Union Mut. Life Ins. Co.* 43 N. Y. 283; *Elwell v. Chamberlin* 31 N. Y. 611; *Presby v. Parker* 56 N. H. 409; *Garner v. Mangam* 93 N. Y. 642; *Bennett v. Judson* 21 N. Y. 238; *Veazie v. Williams* 8 How. 134; *Carpenter v. American Ins. Co.* 1 Story 57; *Mundorff v. Wickersham* 63 Penn. St. 87; *Coleman v. Stark* 1 Oregon 115; *Morse v. Ryan* 26 Wis. 356; *Anderson v. Thornton* 8 Exch. 425; Broom's Leg. Max. 798, 799, 837, 793; Bigelow on Fraud, 367; Whart. Ag. §§ 89, 90; *Robson v. Calze* 1 Doug. 228; *Concord Bank v. Gregg* 14 N. H. 331; *Doggett v. Emerson* 3 Story 700.

In the case of *Morse v. Ryan*, supra, the plaintiff sued upon a contract made with defendant, and the defendant offered to show that he was induced to enter into the contract by false and fraudulent representations. The evidence was objected to on the ground that there was no evidence that what was done by Robinson and Henry Ryan, a brother of plaintiff, who negotiated the contract, was done by authority from the plaintiff. The testimony was excluded. But this was held to be error by the Supreme Court. The Court said: "The plaintiff having ratified and affirmed the contract, he also ratified and affirmed the means by which it was obtained; and such ratification was equivalent to previous authority given by him. The doctrine of the law is well settled, that a principal cannot accept and enjoy the benefits of a bargain made by his agent, without at the same time adopting the instrumentalities by which the agent consummated it." And in *Wilson v. Tumman* 6 Man. & G. 236 (46 E. C. L.) Chief Justice Tindal said: "That an act done *for another* by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a

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tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority." *State v. Perry* Wright 662.

If in this case we should regard the act of Mr. Knaggs in procuring this insurance for the plaintiff as an act done without any previous authority from plaintiff, yet when the plaintiff accepted the policy, and when he seeks to enforce its provisions in his favor by suit upon it, he ratifies the act of Mr. Knaggs, and adopts the contract as his own, and is bound by whatever Mr. Knaggs said or did as an inducement for defendant to enter into the contract as fully as if he had made the representations himself, although he was ignorant of what misrepresentations were made. It was held by Mr. Justice Story in *Carpenter v. Am. Ins. Co.*, above cited, that the misrepresentations made by an agent in procuring a policy are equally fatal, whether made with the knowledge or consent of the principal or not. The ground in each case is the same. The underwriters are deceived; they execute the policy upon the faith of statements, material to the risk, which turn out to be untrue. The mistake is, therefore, fatal to the policy, as it goes to the very essence of the contract. *Augusta Ins. Co. v. Abbott* 12 Md. 348.

It seems to me that it would be an unjust and unwise limitation to engraft in the doctrine of the law, that the principal does not ratify acts on the part of his agent of which he is not informed; and that he can ratify and enforce that part which is for his benefit, and reject that which is detrimental to him. Whatever exceptions may have been raised in cases where the agent has exceeded his instructions previously given, to exonerate the principal, they do not apply to cases of agency by ratification. If a third person, without any authority from another person, assumes to act for his benefit in making a contract, and he adopts such acts and accepts the contract, there can be no reason why such person so accepting should not be held to adopt all the acts and representations by which such contract was consummated. He is not bound to accept the acts of such third person, but if he does so he must accept them as a whole. In such case no question

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of excess of authority can arise, for no authority was given, and the subsequent ratification or adoption is equivalent to a prior command to obtain the contract in the way and by the means it was in fact obtained. He cannot accept a part and reject a part. *Peninsular Bank v. Hanmer* 14 Mich. 208; *Widner v. Lane* id. 124; *Hutchings v. Ladd* 16 Mich. 493.

The policy introduced in evidence contained the following: "The application, survey, plan or description of the property herein insured shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or any overvaluation or misrepresentation whatever, either in the written application or otherwise," shall render the policy void. It thus appears that the representations made as to the property, its risk and exposure, was a part of the application, and made by express terms part of the contract; and it was, furthermore, a part of the contract that if any false representation was made of the condition or situation of the property it should avoid the contract. When the plaintiff adopted the policy as the contract between them, he adopted this provision of the policy, and it was competent for defendants to show what representations were made by Mr. Knaggs when he applied for the insurance, with reference to the matters referred to in this portion of the policy, and then, if they could, to show that such representations were false. I am clearly of opinion that the court erred in excluding the testimony offered for that purpose.

Testimony was offered to show what took place with reference to the attempted cancellation of the policy. The provision of the policy relative to cancellation was that "the companies reserve to themselves the right, at any time and for any cause, to return the assured the unexpired premium pro rata, which shall have the effect to cancel and annul this policy." The record shows that the unexpired premium was not returned before the loss of May 30th occurred, and if the policy ever had validity, it was in force at that time. The testimony was properly excluded.

The judgment of the circuit court should be reversed, and a new trial granted.

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JOHN CONNORS v. THE CARP RIVER IRON CO., JOHN BURT AND ALVIN C. BURT.

Stockholder's liability for labor debts—Repeal of statute.

1. Individual stockholders cannot be made joint defendants with their corporation in an action upon a labor debt brought by an assignee thereof (How. Stat. § 4886), though they may be in an action brought by the original creditor. How. Stat. § 4110.
2. Statutes can only be repealed by express subsequent enactment, or by the necessary implication from a positive repugnancy to the provisions of a later act; but in the latter case the repeal is only to the extent of the repugnancy.
3. Repeals by implication are not favored.

Error to Marquette. (Grant, J). April 23.—June 18.

ASSUMPSIT. Defendants bring error. Reversed.

Ball & Hanscom for appellants. General words in a statute must receive a general construction, and the courts cannot arbitrarily subtract therefrom or add thereto; *Lyman v. Walker* 35 Cal. 634; *Bidwell v. Whittaker* 1 Mich. 469; *Barstow v. Smith* Walk. Ch. 394; *Bork v. Esty* 19 Vt. 131; *Catlin v. Hall* 21 Vt. 152; effect must be given to the words used by the Legislature, if there is no uncertainty or ambiguity in their language: *United States v. Warner* 4 McL. 463; *Doom v. Phillips* 12 Pick. 223; all statutes relating to the same subject matter are to be interpreted together: *United States v. Collier* 3 Blatchf. 325; *State v. Rachley* 2 Blackf. 249; *Ingalls v. Cole* 47 Me. 530.

F. O. Clark for appellee. A general statute when inconsistent with a special one, does not repeal it; *Crane v. Reeder* 22 Mich. 334; *Mead v. Paynett* 15 Wis. 156; *Woodbery v. Shackelford* 19 Wis. 55; *Schieve v. State* 17 Wis. 253; Sedg. Const. Law (2d ed.) 97, 98; *Nicholas v. Bertrand* 3 Pick. 342; *Nicholas v. County Commissioner* 21 Penn. St. 37.

CHAMPLIN, J. The Carp River Iron Company is a corporation of this State, and was organized previous to 1875, under an act entitled "An act to authorize the formation

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of corporations for mining, smelting, or manufacturing iron, copper, mineral coal, silver, or other ores, or minerals, and for other manufacturing purposes," approved February 5, A. D. 1853. [How. Stat. §4001.] While said corporation continued to exist and do business, certain parties were in its employ as common laborers, and the corporation became indebted to them for such common labor by them performed, and gave to said laborers, as evidence of such indebtedness, certain due-bills therefor. At the time of the performing of such labor, and the delivery to the laborers of said due-bills, the other defendants were stockholders of the corporation. Subsequent to the delivery of the due-bills, the laborers, who were the holders thereof, duly transferred said due-bills, and all their right and interest therein, by written assignment thereof, to the plaintiff, who brought this suit thereon in his own name, as holder and owner of such due-bills, against the corporation and stockholders *jointly*.

The suit was brought under the provisions of section 35 of Act No. 113 of the Public Acts of 1877, which contains the following provision: "Suit for such labor may be commenced against any or all the stockholders and the corporation jointly." [How. Stat. §4110.] But it was contended on the trial, by counsel for the defendant, that a subsequent act, passed at the same session of the Legislature, to-wit, Act No. 141, provided a remedy for the enforcement of the individual liability of stockholders of corporations, different from that in Act No. 113, in all cases when the action is not brought by the person who performed the labor, but by the assignee of such person. The court below held that Act No. 141 in no manner repealed, modified or changed the provisions of section 35 of Act No. 113, and so charged the jury, and directed a verdict for plaintiff.

The only question presented by plaintiffs in error is the construction of section one of Act No. 141, which he states as follows: "Can an *assignee* of a due-bill given by a corporation for a common labor debt maintain an action therefor against such corporation and its stockholders jointly?" Act No. 113 is entitled "An act to revise the laws providing for

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the incorporation of companies for mining, smelting, and manufacturing iron, copper, silver, mineral coal, and other ores or minerals, and to fix the duties and liabilities of such corporations." This act was approved May 11, 1877, and ordered to take immediate effect.

Section 35 reads as follows: "The stockholders of all corporations existing hereunder shall be individually liable for all labor performed for such corporation, which said liability may be enforced by action in assumpsit commenced within two years from the time when payment for such labor became due, and not afterwards. Every action against any stockholder for labor heretofore performed for any such corporation shall be brought within two years after this act takes effect, and not afterwards, but this shall not be construed as reviving any cause of action already barred by any statute of limitations, nor shall it include any cause of action, the right to sue for which will expire in less than two years after this act takes effect, by virtue of some existing statute of limitation. Suit for such labor may be commenced against any or all the stockholders and the corporation jointly; but no levy shall be made upon the property of stockholders under an execution issued upon such judgment until the property of the corporation shall have been exhausted, and the clerk of the court issuing such execution shall endorse thereon a direction to the officer to that effect. Suit may be commenced against the corporation alone at any time within six years from the time the cause of action accrues, as in other personal actions." [How. Stat. § 4110.]

Section 44 repeals all former acts so far as they relate to corporations authorized by this act, and all acts and parts of acts contravening any of the provisions of this act, but such "repeal of the foregoing acts shall not dissolve any corporation formed or existing under them, and all corporations of the nature of the corporations authorized to be organized under this act, shall be deemed and taken to be organizations under this act, and all rights, obligations, and liabilities contracted, acquired, or incurred by any of such corporations thereunder, shall continue of the same force and effect as

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though such acts had not been repealed; and all corporations, from and after the taking effect of this act, shall be subject to all the provisions hereof, as fully as though such organization had been perfected thereunder."

Section one of Act No. 141 of the Laws of 1877, provides "that whenever, by the Constitution or laws of this State, the stockholders of any corporation are individually liable for any debts of such corporation, the remedy for the enforcement of such liability shall be as hereinafter prescribed, *and not otherwise:* provided, that this act shall not apply to cases where the suit is for labor, *and the action is brought by the person who performed the labor.*" [How. Stat. § 4886.]

Section 14 of the same act provides that "all acts and parts of acts inconsistent with this act, or giving any other or different remedy, or form of remedy, are hereby repealed." [How. Stat. § 4899.]

This act was approved on the 16th day of May, 1877, and was ordered to take immediate effect.

A statute can be repealed only by an express provision of a subsequent law, or by necessary implication through a positive repugnancy between the provisions of the latter and former enactment to such an extent that they cannot stand together, or be consistently reconciled. And where a later statute is absolutely repugnant to a former one in part only, it repeals the former only in so far as the repugnancy extends, and leaves the remainder of the former act in force. If the subsequent act makes a different provision on the same subject as a former, it is not to be construed as an explanatory act, but as an implied repeal of the former, if the latter be incompatible with it; but repeals by implication are not favored in law, and are never allowed but in cases where inconsistency and repugnancy are plain and unavoidable. *Brown v. McCormick* 28 Mich. 215; *Breitung v. Lindauer* 37 Mich. 217. These are familiar principles, and applied to the case under consideration readily solve the question in dispute.

Under the Constitution and laws in force at the time of the passage of these acts, stockholders in several of the corpora-

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tions organized under the laws of this State were liable individually for other than labor debts of such corporations. In most of these cases the law simply declared under what circumstances such liability should attach, but was silent as to the remedy to be pursued. For several years an act had been in force authorizing the assignee of any chose in action not negotiable under existing laws to bring an action in his own name to recover upon such chose in action. Under the existing condition of the laws at the time of the passage of Act No. 141, it is plain to be seen that the Legislature did not intend in any manner to repeal Act No. 113, or any other act providing for the individual liability of stockholders for labor debts, and the remedy by which the same could be enforced under existing laws, where the laborer himself should seek to enforce such remedy. But they did intend, so far as such intention can be gathered from the language of the proviso to section one, to confine assignees of labor claims to the remedy provided by Act No. 141.

Were it not for the proviso to section one of Act 141, the remedy provided by that act would be exclusive, and section 35 of Act No. 113 being inconsistent therewith, and giving another and different form of remedy, would be repealed by section 14 of the act. But the proviso saves that form of remedy provided by section 35 to a particular class of persons, to whom a particular liability has accrued. As the law stands now, the laborer, if he pursues the individual liability of the stockholder for labor performed, must pursue the remedy existing before Act No. 141 was passed. If he prefers not to sue, but assigns his claim, such assignee must seek his remedy under Act No. 141, the same as creditors whose claims upon individual liability of stockholders are not based upon labor performed for the corporation.

It follows that a recovery cannot be had in favor of the present plaintiff against the defendants John and Alvin C. Burt, and

The judgment must be reversed and a new trial granted.

The other Justices concurred.

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Highway Commissioners of Eagle Township v. Thomas Ely.

Injury to abutting owners by lawful ditching—Obstruction.

1. A commissioner of highways, or an overseer acting under his direction, incurs no liability to abutting owners if, in the proper exercise of his lawful discretion, and for the sole purpose of improving the highway, he runs a ditch in front of their premises which they have to bridge in order to reach the road.
2. The injury, if any, which a lawfully constructed ditch occasions an abutting owner, is damnum absque injuria.
3. Acts done by authority of a valid statute, and with reasonable care, will not support any liability for resulting damage.
4. Abutting owners have the right of access to the highway, and one who has been cut off therefrom by the running of a ditch, or the improvement of the road, may bridge the ditch, or grade the approach to his premises; but in so doing, he must not obstruct the ditch or the way.
5. It is "willfully" obstructing a public ditch for one who knows its character to purposely and perversely fill it up in a permanent way, even though his object is to obtain access from his lands to the highway, and the act is done under a mistaken notion of his rights.

Error to Clinton. (V. H. Smith, J.) April 25.—June 18.

Case. Defendant brings error. Affirmed.

H. J. Patterson and *Spaulding & Barker* for appellant.

L. W. Hill and *Mitchell, Bell & McGarry* for appellee, as to the meaning of "willfully," cited *Com. v. Walden* 3 Cush. 558.

Champlin, J. The commissioner of highways sued Ely in justice's court to recover the statutory penalty for willfully obstructing a ditch constructed for draining the highway, (How. Stat. § 1403,) and recovered judgment before a jury. He appealed, and another jury trial was had, and he brings the case here on writ of error.

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The record discloses that the defendant was the owner of lands adjoining the highway; that there was a hollow or sag in the road in front of defendant's lands, and on one side of the road-bed gravel had been taken for the purpose of repairing the road, leaving a dangerous pit. On defendant's land there was a swampy place, and he had caused a ditch to be made which drained the waters from this swamp in this low place in the highway, where it gradually percolated through the soil of the gravel-pit and disappeared. But at certain seasons there had been such quantities of water at this low place as to overflow the road, making the passage dangerous. For the purpose of draining the water from this low place and protecting the road-bed from overflow, the commissioner of highways directed the overseer of the road-district to dig a ditch along the side of the road, so as to carry off the water so accumulating in the highway as above described. The ditch, if constructed as directed, would pass in front of the gate of defendant leading to his wheat-field, in which a crop was then growing. The overseer, against defendant's objections, acting in obedience to the instructions of the highway commissioner, constructed a ditch from the gravel-pit past defendant's gateway, at which point it was from eighteen inches to two feet in depth, and extending southward beyond defendant's lands to a culvert across the highway, the whole length of the ditch being some six or seven rods. This occurred on the 20th day of June, 1882. When defendant objected to the digging of this ditch, the overseer told him if he would consent he would fix a safe and convenient passage over it if he had to build a bridge, but defendant refused, saying he did not want a ditch and would not have a bridge. On July 14, 1882, defendant, claiming that he wished to draw his wheat from his field, filled the ditch in front of his gate with rails, boards and gravel to the level of the adjacent surface. At this time no water was flowing in the ditch, and there was but little water in the pit, which defendant caused to be drained into the soil by loosening the earth with his spade.

It is claimed by the plaintiff that this act of filling up the

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ditch was a willful obstruction of the ditch dug for draining the highway, while defendant insists it was for a lawful and necessary purpose, and did not injure or obstruct the ditch or the highway, nor did water reach this point so that a ditch was necessary, or if it ever flowed there it was because the overseer had turned it out of its proper channel and filled up a gravel-pit where the water formerly made its escape.

The jury, besides finding a general verdict for plaintiff, also found in answer to special questions, as matter of fact, that the ditch served to drain the highway at the time the defendant filled it up; that the object of the defendant in filling up the ditch was to obstruct it; that filling it up tended to prevent the public from passing and repassing; that the defendant filled it up without any authority, and not for the purpose of enabling him to draw out wheat from the adjoining lot; and that the digging of the ditch did not change, but did define a water-course.

Errors are assigned upon the rulings of the court in refusing to charge as requested by the defendant's counsel. These requests were as follows:

5. Notwithstanding the public have at all times the right to repair the road and bridges, and to keep them in reasonable repair, they are nevertheless bound to respect and observe the rights of the land-owners. And in this case, if the jury find that the defendant was in the habit of passing out and in from the highway and into his field, and had been for a long time in the habit of so doing, and had used the same for his own road, and had maintained a gate there for that purpose, then in that event he would have a right to use and enjoy the same as long as it did not interfere with the public travel.

6. While the public have the right to do all and every act necessary to keep the road in repair, it must be done in a reasonable manner, and the repairs must not injure the premises nor the rights of the land-owner. They both have rights; and while the commissioner of highways has a right to enter upon the defendant's lands, so far as is necessary to repair the roads, he would have no right to do anything that would permanently hinder the defendant from passing onto his fields. And if you find that the commissioner or overseer of highways dug, or caused to be dug, the ditch in ques-

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tion in front of the defendant's gateway, and then left the same open in such a way that he could not pass out and into his fields as he formerly had done, and as he was compelled to in order to draw his crops into his barn, then in that event the defendant would have a right to repair or fix the same so as to enable him to pass over with his team and vehicles, and this he could do in any way he might choose, so long as he did not in any way hinder the public travel or unreasonably injure the highway; and even if it did injure the highway, and, unavoidably, temporarily hindered the public travel, the land-owner has such an unqualified right to the soil that he might be justified in temporarily obstructing the highway for his individual benefit. The right of the overseer of highways to the use of the defendant's land, and to repair the roads and bridges in a reasonable manner, are the same rights and duties as are conferred upon the land-owner, so far as the use he makes of the same.

7. If the jury find from the evidence that the ditch in question diverted the water from its natural course, and caused it to flow where it could not and would not naturally flow, and in the digging of the same in front of the defendant's gateway, and leaving the same open, and thereby obstructing its passage-way out and into his field, it would be unauthorized, and would constitute an unlawful act on the part of the overseer of highways, and the defendant would have a right to fill it up as far as it would be necessary to pass out and in, so long as he did not in any way interfere with the public right of way.

11. If the jury should find from the evidence that the act of the defendant in filling up the ditch was to enable him to draw his wheat out of his field or into his barn, and that in doing so he used his customary road, then in that event, he would have a perfect right to do so, so long as he did not unreasonably hinder the public travel, and it would not be willful obstruction within the meaning of the statute, and the plaintiff could not recover.

It will not be necessary to examine these requests in detail. A statement of the law governing the respective rights of the public authorities with reference to the highways and the adjoining land-owner will be sufficient to show that these requests are based upon an erroneous view of the legal rights of the parties. The duties and authority of the commissioner of highways and of overseers are prescribed

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by How. Stat., tit. ix, ch. 29. So far as the questions under consideration are concerned they are the same as those prescribed by Comp. L. (1871) ch. 23, under which the case of *Conrad v. Smith* 32 Mich. 429 was decided, in which it was said: "Under and subject to these regulations commissioners may provide for such ordinary highway ditches and culverts as the good of the road shall dictate; but they cannot lawfully depart from this object, which is the beginning and end of their authority, and, under color of ditching to improve a road, proceed to cut drains to promote the health of the neighborhood and improve the surrounding lands and increase their value. The power to ditch and drain for road purposes is necessarily very limited, and its exertion is only authorized when the sole end of such exertion is the improvement of the road and the consequent benefit to the public; and the power, after being rightly set in motion in connection with an authorized object, cannot be lawfully carried beyond such object and into a domain which the law has assigned to another system and authority. * * * In the case of mere highway ditches the whole matter is summary and substantially of discretion, and no provision is made for allowing damages, the law assuming that the work is to be exclusively upon public grounds and for the public benefit, and that nothing is authorized to be done which could fairly be considered as a private and individual damage."

If, therefore, in this case the ditch in question was such an ordinary ditch as the good of the road should dictate; if the sole end of constructing it was to improve the road and the consequent benefit to the public; and if in carrying out this object it became either necessary or expedient to dig the ditch in front of the defendant's premises and past his gateway, the commissioner, or overseer acting under his directions, had a right to do it; and if in the execution of this power, which was entirely in their discretion, they dug the ditch to such depth and width as to render it impassable for teams or vehicles going in or out of defendant's fields, they would incur no liability to defendant. It would be the per-

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formance of a public duty and the exercise of lawful authority, from which, if defendant suffered injury, it would be damnum absque injuria. There is no liability for doing an act which is either directed or authorized by a valid statute, if performed with reasonable care and skill. There is no law which requires the township authorities, in making or repairing roads, to construct proper or convenient passageways to enable an adjoining land-owner to reach the traveled part of the highway. If in filling up the low places or in cutting down the hills to improve the public roads an adjoining land-owner is inconvenienced, or his land made more difficult of access, it is an inconvenience or loss which he sustains for the public benefit. He has a right of access to the public street, and if necessary for him to reach the traveled part, he has the right to bridge a ditch or construct a grade for that purpose; but in doing so he has no right to willfully obstruct such ditch or highway, his rights as a private land-owner being subordinate to the public right of constructing and keeping the highways in repair.

The circuit judge instructed the jury that if the end sought by the commissioner and overseer was the improvement of the road, then their conclusion as to the necessity, honestly arrived at, could not be reviewed by the court. But if the ditch was not made for the purpose of draining,—if it was done for any other purpose; if done to annoy or spite or injure the defendant,—then they had no right to make it. That their duties were to look after the roads and highways, and to do such acts as, in their judgment, were necessary for the improvement and repair of them, and such as tend in some degree, at least, to accomplish that purpose; and if they should step outside of that, and under cover or claim of doing it to improve the highway, really do it for some other purpose, then the law would not protect them in their act; they would be just as liable as though they were strangers, and if done to annoy or spite or injure the defendant, he could lawfully and properly fill it up.

He also charged the jury as requested by the defendant, that "if the jury find that the overseer of highways exca-

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vated at the side of the highway on the defendant's land, and in front of the defendant's gate-way, the ditch in question, and that it did not have the purpose of draining the highway, but was only a hindrance to the passage from the defendant's fields to the highway, and interfered with the use of the defendant's land, or the property, then in that event the defendant would have the right to fill it up so that he could pass out and in, without any direction from the overseer or commissioner, and it would not be a willful obstruction of the ditch within the meaning of the statute."

And in conclusion the judge charged as follows:

"The statute reads, gentlemen of the jury, 'who shall willfully obstruct any highway, or fill it up, or place any obstruction in any ditch constructed for draining the water from any highway.' Now if you should find that the ditch was dug for the purpose of improving,—honestly dug for that purpose,—and it did tend in some degree to drain the water from the road, then I don't think, under the statute, you would have to find that the man who filled it up did it out of malicious motives, or through malice or spite against any person. It reads: If he shall willfully obstruct any highway, or fill up or place any obstruction in any ditch. Now if he goes there and knowingly fills it up, if dug as I have before stated, and it tends in some degree to do what it is dug for,—knowingly fills it up,—it seems to me, under the language of the statute, he would be liable. In other words if the word 'willful' applies to the filling up or placing any obstruction in any ditch, that it is to be used in this sense in contradistinction to accidentally; that he willfully and knowingly does this,—does it wrongfully and without right. But if the ditch, as I have told you before, was put in there by the overseer of highways, he honestly thinking that it would accomplish the object of draining the road, and yet, after it was in, it did not tend at all to do the thing, it was simply a ditch or gully in front of this man's gate. If that was the fact you find from the evidence, then I do not think there would be any wrong in the man filling it up so that he could get in to his land and draw out his wheat.

The burden is upon the plaintiff in this case to make out a cause of action. He comes into court saying that the defendant has done wrong, and he must establish his allegations by a preponderance of evidence. If the evidence is equally balanced in your minds as to any given point, upon

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that point you must find for the defendant. I do not mean that there must be more witnesses on one side than the other, but the evidence must be of such a character that it is more convincing to your minds upon every material point, in order to find for the plaintiff. If the plaintiff recovers at all in this case it is conceded that it is twenty-five dollars; that is the amount fixed by the statute; so that your verdict would be, if for the plaintiff, in the sum of twenty-five dollars; if for the defendant, not guilty."

And the court refused to charge as requested by the defendant in his tenth request, as follows:

10. The word "willful" here used, when properly defined, means being controlled by the will in contradistinction to reason,—that is, obstinate, stubborn, perverse, inflexible,—and does not include the filling up the ditch by the defendant in good faith and for a justifiable purpose.

The word "willfully," when used to denote the intent with which an act is done, is a word which is susceptible of different significations, depending upon the context in which it is used. It is employed in penal statutes more frequently to distinguish between those acts which are intentional and by design and those which are thoughtless or accidental. It may sometimes mean corruptly or unlawfully, or again designedly or purposely, with an intent to do some act in violation of the law. *Com. v. Bradford* 9 Met. 270; *Com. v. Brooks* 9 Gray 303; *Com. v. McLaughlin* 105 Mass. 463. Sometimes it is used as implying an evil intent without justifiable excuse. 1 Bish. Crim. Law § 428; *State v. Abram* 10 Ala. 928; *McManus v. State* 36 Ala. 285; *Com. v. Kneeland* 20 Pick. 206; *U. S. v. Three Railroad Cars* 1 Abb. U. S. C. C. Rep. 196. A similar statute was for many years in force in Wisconsin,—section 101, ch. 19, Rev. St. (1 Tayl. Stat. p. 508, § 137,)—which enacted that "whoever shall willfully obstruct any highway, or fill up or place any obstruction in any ditch constructed for draining the water from any highway, shall forfeit for such offense a sum not exceeding twenty-five dollars; and the overseer of the proper district shall cause such obstruction immediately to be removed."

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The case of *State v. Preston* 34 Wis. 675 was one involving the construction of this statute, and especially that element pertaining to the word "willfully," and the court reviewed and commented upon many of the authorities above cited. The supreme court held that the word "willfully," employed in the statute to characterize the offense, could not be construed so as to embrace an obstruction erected in the most perfect good faith by the land-owner, believing that no highway existed at the place, and acting under the advice and direction of the proper public officers charged by the law with the general supervision and control of all the roads and highways in the town. The obstruction complained of in that case consisted of a fence erected in what was claimed to be the public highway. The defendant had petitioned the supervisors of the town, who were clothed with the power to take up the highway, and they refused to act, saying there was no highway there, and advising defendant to fence it up, which he did. The court say: "An obstruction so created cannot be regarded as willful, within the meaning of the statute, even under the mildest construction which can here be put upon that term. It may be unlawful, and so determined in the end, notwithstanding the opinion and advice of the supervisors, for they may be mistaken; but it cannot be said to have been erected with that intent or unjustifiable purpose made necessary by the statute to constitute the offense for which a penalty has been imposed."

If we should apply the reasoning of that decision to this case, how would it stand? Does the record show that the defendant placed the obstructions in the ditch in question with that intent and unjustifiable purpose made necessary by the statute to constitute the offense for which the penalty has been imposed? There is no question about the legal existence of the highway, nor of the expediency of draining the water from the highway. Defendant denied the right of the public officers to cut a ditch in front of his gateway; acting under a mistaken notion of his rights, he placed obstructions in the ditch permanent in character, and so as to totally obstruct it for the purposes of draining the water from the

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highway. The act was intentional, and testing his motive by the facts that he said he would have no ditch there and no bridge there, and his filling the ditch with rails and gravel to the level of the adjacent surface, there can be no doubt but that it was willful, even in the sense contended for by his counsel of being obstinate, stubborn, perverse and inflexible. The fact that one object he had in view was to draw away his wheat, did not justify him in obstructing the ditch, for he could and should have accomplished that object by bridging over, or in some other method which would not have obstructed the ditch.

The judgment of the circuit court must be affirmed.

The other Justices concurred.

William Courtright v. Township Clerk of Brooks Township.

Collection of judgment against township after its subdivision.

Mandamus lies to compel a town clerk to issue the proper certificate for the levy of a tax to satisfy a judgment against the township, even though the cause of action arose in territory that was set off as a new township after it arose and before judgment.

Mandamus. Submitted April 29. Granted June 18.

A. G. Day for relator. Subdivision of a town after suit has been brought against it and before plea is no defense: Dill. Mun. Corp. §§ 36, 126; *Layton v. New Orleans* 12 La. Ann 515; *Girard v. Philadelphia* 7 Wall. 1; *People v. Hill* 7 Cal. 97; *Blanchard v. Bissell* 11 Ohio St. 96; *Powers v. Wood* 8 Ohio St. 285; *Arnoult v. New Orleans* 11 La. Ann. 54; *Cheaney v. Hooser* 9 B. Mon. 330; *Gorham v. Springfield* 21 Me. 59; *Morford v. Unger* 8 Ia. 82; *St. Louis v. Russell* 9 Mo. 503; *St. Louis v. Allen* 13 Mo. 400; *R. R. Co. v. Spearman* 12 Ia. 112; *Wade v. Richmond* 18 Grat. 583; *Norris v. Mayor* 1 Swan 164; *Elston v. Crawfords-*

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ville 20 Ind. 272; *Edmunds v. Gookins* 20 Ind. 477; when part of the inhabitants and territory of an older town are erected into a new corporation, the old town is subject to all its former liabilities: *Hartford Co. v. Hartford* 16 Conn. 149–171; *Windham v. Portland* 4 Mass. 384; *Hampshire v. Franklin* 16 Mass. 76; *North Hempstead v. Hempstead* 2 Wend. 109; *Richards v. Dagget* 4 Mass. 539; *Richland county v. Lawrence* 12 Ill. 1; *Blackstone v. Taft* 4 Gray 250; *North Yarmouth v. Skillings* 45 Me. 133; *Cobb v. Kingman* 15 Mass. 197; *Minot v. Curtis* 7 Mass. 444: Opinion of Sup. Judge 6 Cush. 575, 578; on division of a township each portion remains liable for the whole liability of the old township, and if one fraction pays the whole amount it only lays a foundation for contribution: *Plunkett v. Crawford* 27 Penn. St. 107.

Cooley, C. J. On April 30, 1881, the relator, in the circuit court for the county of Newaygo, recovered judgment against the township of Brooks for an injury sustained January 12, 1880, by reason of a defect in a bridge in said township, which it was the duty of the township to keep in repair.

On January 6, 1881, the supervisors of the county of Newaygo divided the township of Brooks into two townships,—to one of which they gave the name of Garfield, while the other retained the name of Brooks. The bridge where the accident occurred, fell within the new township of Garfield. On October 6, 1881, the township boards of the two townships apportioned and divided the money and property of the old township of Brooks between the two townships, but made no provision in respect to said judgment. The relator claims that the township of Brooks, as it now exists, is his debtor, and he asks a mandamus to compel the issue of the proper certificate for the levy of a tax for the satisfaction of the judgment.

We think the relator is entitled to the relief he prays. The position of the respondent is that, when a new township was created by the supervisors, the old township of Brooks was dissolved, and not one new township but two were created; the board giving to one of the new townships the name of the old. But this is not the legal view of their

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action. The legal view is that the old corporation, known as the township of Brooks, was left in existence; a new township being merely set off from it. And remaining in existence, it would remain chargeable with all its previous obligations. The remedy to compel the new township to share in the old burdens is to have an apportionment of them under the statute. How. Stat. §§ 788–795.

The answer to this, on the part of the respondent, is that the claim of the relator was a mere claim to damages for a tort until the judgment was rendered, and therefore the liability could not have been apportioned between the townships, under the statute. If this is so, we do not think it will affect this proceeding. The judgment is against Brooks township; and if the existing statute fails to make provision for the enforcement of its equities against the new township, the remedy must be sought at the hands of the Legislature. The case is not one for judicial relief.

The mandamus must issue as prayed.

The other Justices concurred.

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Orrin Thatcher, administrator v. Nathan B. Hayes and Samuel W. Webber.

Accounting—Proof of allowances against complainant.

1. An administrator brought suit for an accounting, against one who had made sales for his decedent. A note had been taken on one of the sales upon which a certain payment was indorsed. It was found, but only by the aid of a letter written by decedent, that this was really for merchandise turned over to a creditor of his; but as the letter mentioned a smaller sum it was *held*, that it could not be given effect beyond its terms, and that only the smaller sum could be charged against the estate.

2. In a suit for an accounting defendant has the burden of proving what allowances should be made to him.

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Appeal from Washtenaw. (Joslyn, J.) April 30.—June 18.

ACCOUNTING. Defendant Hayes appeals. Decree modified.

Sawyer & Knowlton for complainant. One who receives from another his property for the purpose of selling it and paying the latter's debts from the proceeds is a trustee for sale: *Page v. Olcott* 28 Vt. 465; *Meacham v. Sternes* 9 Paige 398; *Norton v. Squire* 16 Johns. 225; *Swoyer's Appeal* 5 Penn. St. 377; *Clark v. Craig* 29 Mich. 398; *Bank v. Chapelle* 40 Mich. 447: Perry on Trusts §§ 786, 453, 585; Story on Agency § 98; *Johnson v. Totten* 3 Cal. 343.

Mitchel, Bell & McGarry for defendant appellant.

COOLEY, C. J. The bill in this case is filed for an accounting. Congdon, the intestate, being indebted to Hayes, and being owner of a large amount of lumber, shingles, logs and machinery, made a nominal sale of them to Hayes, with the purpose that Hayes should sell them and account for the proceeds. Hayes has made sale of them all, and now the question is whether he has accounted for all the proceeds.

A sale of lumber was made to one Taft, and notes taken for the purchase price. Upon one of these notes an indorsement of $528 was made as for a payment. One of the principal questions in the case is whether Hayes received this sum, or whether the indorsement was for the value of shingles which Taft furnished to one White on a debt owing by Congdon to White. After full and patient consideration of the case we are constrained to say that the evidence leads us to the conclusion that Congdon's estate should be charged with the price of shingles furnished by Taft to White; the evidence satisfactorily showing that they were furnished on Congdon's debt. But we do not think the allowance can exceed the sum stated in Congdon's letter referring to the transaction, dated December 28, 1874, in which it is given at $420. Without the aid of this letter we do not think the main fact could be established against Congdon; and we cannot give it effect beyond its terms.

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It is not entirely plain that other allowances ought not to be made to Hayes, but the burden of proof is upon him, and we cannot say that he has satisfactorily established his right to any other.

The decree must be modified so as to make the allowance mentioned, and Hayes will recover the costs of this Court.

The other Justices concurred.

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CHARLES S. COLLINS v. HARRISON W. JACKSON.

Fraudulent representations—Seller's talk—Damages.

1. Where the declaration in an action for damages alleges fraud as the basis of the action, the facts must be proved as set forth.
2. In an action brought by a purchaser for fraudulent representations by the vendor, proof that the consideration for the sale was paid for the goods and the good-will of the business, is fatally variant from a declaration which only states that it was for the goods.
3. One who bought the goods and good-will of a business, afterwards sued the vendor for fraudulent representations. *Held*, necessary to the ascertainment of damages that he aver in his declaration, and show in his proofs, what part of the consideration was paid for the good-will.
4. A vendor's honestly expressed but incorrect opinion as to the amount, quality and value of the goods he sells will not support an action for fraudulent representations, if the purchaser sees or knows the property, or has opportunities to know it. The purchaser cannot recover unless the vendor, with superior means of knowledge, intentionally gives a false opinion as to material facts, for the purpose of defrauding the purchaser, and the latter has reason to rely and does rely on it as true.
5. In an action for fraudulent representations by the vendor on the sale of goods, it is for the jury to determine whether the opinion expressed is false and known to be so to the vendor, and to what extent it is relied on by the purchaser without negligence.
6. In an action for damages resulting to the purchaser of a stock of goods from the fraudulent representations of the vendor, evidence that the

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purchaser in settling his affairs had been compelled to dispose of his wife's house and lot, is inadmissible, if not counted on in the declaration, and if the fraud complained of was not the proximate cause of the loss of the house and lot.

Error to Marquette. (Grant, J.) June 3.—June 18.

CASE. Defendant brings error. Reversed.

Ball & Hanscom for appellant. Ordinary seller's talk, if honestly meant, will not support an action for fraudulent representation: 1 Sugd. Vendors 3; *Bishop v. Small* 63 Me. 12; *Davis v. Meeker* 5 Johns. 354; *People v. Jacobs* 35 Mich. 36; *Ellis v. Andrews* 56 N. Y. 83: 15 Am. Rep. 379; Cooley on Torts 483; 2 Kent's Com. 485; Kerr on Fraud 82; nor will the representations be actionable if the purchase is made with knowledge of their falsity: *St. John v. Hendrickson* 81 Ind. 350; *Doherty v. Bell* 55 Ind. 205; *Hunt v. Hardwick* 68 Ga. 100.

SHERWOOD, J. This suit is an action on the case brought by plaintiff to recover damages for the alleged fraudulent representations made by defendant on a sale made by him as agent or manager for his wife, of a stock of goods to plaintiff, at Marquette, in November, 1876.

It is claimed by plaintiff that the goods were not as represented to him by the defendant; that he was induced to buy the goods upon the defendant's representation that "the goods were mostly new, were fresh, well selected and salable, and had been purchased at the lowest market prices, and were worth the prices paid for them, and that upwards of $8000 worth had just been purchased and put into said stock," and that the old goods in the store had been mostly cleared out and taken to "the Calumet store;" that the goods were inventoried at the cost price, and that plaintiff paid 5 per cent. more than the inventoried price; that they amounted to the sum of $26,043.21.

The plaintiff avers that he relied upon these representations in making the purchase, all of which were untrue; that many of the goods were old and shelf-worn; that they were inventoried above retail prices for same, and that not more than $2000 worth of new goods had been placed in the stock; that

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all were unsalable and not worth the prices paid for them, and that defendant knew the representations to be untrue at the time he made them; that the stock consisted of dry, millinery and fancy goods; and that he had suffered great loss from the acts and representations complained of. The cause was tried before a jury, and the plaintiff had judgment for $3140.

This case has once before been in this Court, (see 39 Mich. 557,) and the character and sufficiency of the declaration, and the rule of damages thereunder, was then passed upon. The case is now before us upon exceptions to the rulings of the court upon the trial, and to the charge and refusals to charge. The record contains all the testimony taken.

Many of the representations, as stated in the declaration and claimed to have been relied upon by plaintiff, are vague and very general; indeed, it is difficult to distinguish them from mere expressions of opinion upon the subjects to which they relate; but the declaration was not demurred to. And under the rule stated when the case was first before this Court, and to which we still adhere, "that when issue is joined on the facts the declaration cannot be held fatally defective, unless inconsistent with any reasonable ground of action," there was, upon all the facts stated and averred to be false, if sustained by the proofs, a sufficient case to be submitted to the jury.

The evidence shows that, at the time the plaintiff made the purchase in 1876, he was engaged in merchandising at Ontonagon, and had been in the dry goods business many years previous; that Mrs. Jackson, the owner of the stock sold, and wife of the defendant, was dealing in fancy and dress goods and carrying on the millinery business at Marquette, where she had been engaged in the business about three years, and in which she was assisted by the defendant. After some correspondence between the parties the plaintiff went to the store of Mrs. Jackson where the stock of goods was, and saw her and the defendant and made a contract for the purchase of the goods, which was about the 6th of November, 1876. Mrs. Jackson agreed to sell the stock to plaintiff, and both

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she and her husband bound themselves not to engage in the same business for five years in Marquette, unless the plaintiff and his sons should go out of trade. The inventory of the goods was then taken, which took from the 10th to the 17th of November, during all which time the plaintiff's son assisted, and the plaintiff was at the store several times, and had access to the goods all the time, and opportunity to examine the same.

The plaintiff took possession of the stock purchased under the contract of sale on the 15th day of November, 1876, and was selling the goods on the 29th, when he executed to the defendant the notes for the purchase money, in pursuance of said contract. The plaintiff, after he took possession, carried on the business over four months, during which time he sold mostly staple goods to the amount of over $5600 at a profit of 15 per cent., and during the same period put into the store $1084 worth of new goods. He then made an assignment for the benefit of creditors, under which an inventory was taken, showing $23,000 worth of goods still on hand. He had not carried on the millinery business, being unable to make it pay.

The plaintiff subsequently made an arrangement through a friend, by which a house and lot belonging to his wife was turned over to his creditors, together with his other assets, in full of all his indebtedness; the house and lot claimed by plaintiff to be worth $3000. This arrangement was effected by defendants' buying the goods and the house, taking the latter at the estimated value thereof, and paying the rest of the creditors their respective shares thereof, and giving up to Collins' assignee, the notes the defendant held against Collins for the purchase price of the goods. Mrs. Collins contested this transfer of the house and lot, but under the legal proceedings taken by her she failed in her contest. See 43 Mich. 558. She succeeded however in depriving the defendant of the use of the property from April, 1877, to July, 1880, pending the litigation; and after the defendant obtained possession he sold the house and lot for $1500. The testimony further showed that about $12,000 worth of new goods had been put

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into the store the fall the sale was made to plaintiff, and that the natural depreciation of the same and the rest of the goods, during the time the plaintiff had them, would be about $3000.

The declaration in the case avers that the consideration given was for the stock of goods, and the proofs admitted show it was for the goods and good-will of the defendant's business, he and his wife promising not to engage again in the same business in Marquette for five years if plaintiff continued there that length of time. This was claimed by defendant's counsel to be a fatal variance, and the testimony was objected to upon that ground. The court ruled otherwise. We think the defendant's objection well taken. Where fraud is alleged, the facts which are made the basis of the wrong should be proved as stated.

It nowhere appears in the declaration what part of the consideration was for the good-will of the defendant's business. This should have been averred in the declaration and shown on the trial before the damages plaintiff was entitled to, if any, could be properly ascertained. The considerable amount of damages claimed in the case and found by the jury, renders this point of importance to the defendant, and his fifth and seventh requests[1] should have been given to the jury.

It is claimed by defendant's counsel that the false representations alleged to have been made in this case, and upon which the plaintiff relies for his damages, as stated, are so

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[1] The instructions requested were these:

5. The purchase alleged in the declaration is the purchase from Mrs. Jackson of a stock of goods for a certain price. The proof is that the purchase was that of a stock of goods and the good-will of an established trade, with the agreement that neither the defendant nor Mrs. Jackson should go into the same business in Marquette for a term of years, so long as the plaintiff or his sons remained in the business. The variance in that respect between the declaration and the proof is fatal, and the plaintiff cannot recover.

7. The purchase was that of a stock of goods and the good-will of the business, with Jackson's agreement not to go into the same business for a certain time. The sale of the stock was only a sale of the goods, and not of the good-will. There is no evidence how much the good-will was worth, or how much was paid for it; and there is no basis upon which to estimate, as damages, the difference between the purchase price of the goods and the price at which they were sold, and no actual damages can be given.

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vague and indefinite as to be almost incapable of proof, and that the evidence offered does not support the statements, even as averred; that the representations testified to by plaintiff, if proved, would not have entitled the plaintiff to recover. The opinion of the vendor of property he is selling, as to amount, quality or value, is frequently asked and usually given on sales, and is never actionable if no more than opinion is expressed and honestly given; and when the vendee sees the property, or has knowledge of it, or has opportunities for knowing, the vendor cannot be made liable. It is only when superior knowledge exists on the part of the vendor, and he knowingly gives a false opinion in regard to material facts, with the intention of defrauding the purchaser, that the latter can maintain an action. In other words, the expression of an opinion by the vendor can never be made actionable, if false, unless it be so strong and based upon such superior knowledge to the extent that it was relied upon as true, and reasonably so by the vendee, as a fact, and known to be thus relied upon by the seller. This was substantially so held in this Court in the case of *Picard v. McCormick* 11 Mich. 68, and in this case when formerly before this Court. Further than this we do not think safety will permit us to go.

It is not the policy of the law to compensate negligence, and it is the duty of the courts to see to it that parties are not permitted to profit therefrom. The questions whether or not the opinion given by the vendor in such a case is false, and to him known so to be, and to what extent it is relied upon without negligence upon the part of the vendee, must be determined by the jury upon the evidence in the case, under proper instructions from the court. We do not think, under the testimony in the case, it should have been taken from the jury; and no error was committed by the court in refusing so to do.

We have thus far considered the plaintiff's declaration, and the character of the averments therein contained.

Several objections were made to the plaintiff's proofs offered and received, on the ground that they did not sup-

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port the averments contained in the declaration, and these objections, we think, were well taken. Very much of the testimony offered of the statements and representations alleged to have been made scarcely goes beyond the most ordinary commendations indulged usually on sales by owners of personal property, and should not have been permitted to go to the jury. The most casual observation of the goods made by a man of the plaintiff's intelligence, skill and experience could not have failed to qualify him to judge correctly of the truthfulness of the representations made by the defendant.

Under the testimony contained in the record it is difficult to see why the plaintiff was not sufficiently apprised of the amount, kind and quality of the goods purchased when the inventory was taken, and it would seem that under the circumstances the statements of the vendor could hardly have been much relied upon as of importance upon those subjects; and if the vendee, having such opportunities for information, failed himself to ascertain the facts, it may be well questioned whether he can shield himself from the consequences of such negligence by asserting reliance upon the opinions expressed by the vendee. *Slaughter v. Gerson* 13 Wall. 379; *Rockafellow v. Baker* 41 Penn. St. 319; *Brown v. Leach* 107 Mass. 364; *Long v. Warren* 68 N. Y. 426; Cooley on Torts, 487.

It was claimed on the trial, as one of the items of plaintiff's damages, that he had lost his house and lot in settling up and getting rid of his indebtedness to the defendant, and evidence was allowed to be given upon that subject, which was objected to by defendant's counsel, and the court overruled the objection. This was error. Nothing of this kind was stated as a ground of damages in the declaration; and the court should have also given the defendant's ninth and tenth requests upon that subject.[1] It was also error to give

[1] These requests were as follows:
9. Upon no state of facts testified can the plaintiff be allowed the value of the house and lot as damages in this case, under the declaration.
10. It appears that the house and lot did not belong to the plaintiff, and there is no evidence that he paid or agreed to pay anything for it, and no damages can be allowed on account of the house and lot.

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those portions of the charge contained in the seventeenth and eighteenth assignments of error.[1]

There was no immediate or necessary connection between the fraud complained of in the declaration and that claimed by the plaintiff to have resulted in the loss of his house and lot.

The circuit judge charged the jury that "if, after consideration of all the facts and circumstances proved in this case, you believe from the evidence that the defendant was guilty of making the false representations alleged in the declaration in this case; that the plaintiff relied on them; that he made the purchase in consequence of those representations; and that he suffered damage,—you will find for the plaintiff, unless you find that a settlement was made between the parties, and in such case your verdict will be for the damages as I have indicated." This charge was excepted to, and properly so. It fails to inform the jury that they should find the representations were such that the plaintiff, under the circumstances, had the right to rely upon them. It also ignores the consideration of any alleged neglect on the part of the plaintiff, or any necessity of knowledge, on the part of defendant, of the falsity of the representations.

We do not think it necessary to consider the assignments of error further; for those already noticed,

The judgment must be reversed and a new trial granted.

The other Justices concurred.

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[1] These were as follows:

17. That the court erred in charging the jury that "it makes no difference whether the house in this case belonged to Mr. Collins or belonged to his wife. If Mr. Collins procured that deed from his wife for the purpo-e of using it in case of a settlement, or in case he should decide to settle, that would make no difference, so far as any damages he would have to pay are concerned, whether Mr. Collins owned the money or somebody else owned the money; whether Mr. Collins owned the property or somebody else owned the property so used in making the arrangement, or in the attempt to carry out and effect any arrangement."

18. That the court erred in charging the jury as follows: "If you find that the actual damages sustained from the fraudulent sale of this property, if there was one, were equal to or exceeded the value of this property, then your verdict would be for the value of the property; but if you find that the difference between the goods as they were represented to be by Mr. Jackson, and the value as they actually were, was not equal to the value of this property, then your verdict would only be for so much as you should find the damage actually was."

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RUFUS H. GROSVENOR, ADM'R FOR ROBT. L. BUNBURY v. CLARK HARRISON, CHAS. F. HESS, ADDISON P. COOK ET AL.

Witness—Suspicious minuteness.

A witness is apt to discredit himself by seeming to remember in minute detail long past conversations between third persons on business matters in which he could have had no interest; especially if it appears that these details had been casually suggested to him some time before by a person interested in proving them to be true.

Appeal from Kalamazoo. (Mills, J.) June 4.—June 18.

FORECLOSURE bill. Defendant Harrison appeals. Reversed.

Howard & Roos for complainant.

Powers & Oxenford for appellant.

COOLEY, C. J. On March 26, 1866, Darius W. Field was owner of a farm in the township of Brady, Kalamazoo county, containing one hundred acres, and was in negotiation with Charles F. Hess for the exchange of the farm for land in Jackson county, for the purchase of which Hess held a contract from Addison P. Cook. On this contract the sum of $1769.16 was owing, and Field proposed in making the exchange to have the Cook contract satisfied by Hess giving him a bond for the sum owing upon it with collateral mortgage on the Brady farm. Neither Hess nor Cook knew the Brady farm; but Field made very favorable representations respecting it, which seem to have satisfied Hess, and the bond and mortgage to Cook were executed before the negotiation with him was had. The contemplated arrangement with Cook was afterwards effected; but Cook would only take the bond and mortgage on condition that he should find the Brady farm to be as represented by Field. On investigation, Cook claimed to have become satisfied that Field's representations were false and fraudulent, and he therefore refused to

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recognize any interest in himself in the bond and mortgage, and refused to comply with a demand by Field that he should deed the Jackson land to him. The result was a suit by Field against Cook for the specific performance of the land contract; and this, after being in court several years, was decided in Cook's favor. After the litigation was ended, and on July 1, 1874, Cook made to Field a formal transfer, in the nature of a quit-claim, of the Hess bond and mortgage, and Field put the mortgage on record the same month. On September 25, 1877, Field assigned to Robert L. Bunbury, and on January 2, 1882, Bunbury commenced a foreclosure.

Meantime the following conveyances of or affecting the Brady farm had been made:

August 17, 1866, Hess conveyed it to Matthias W. Van Tassel.

October 1, 1866, Van Tassel sold to James Albro. Albro gave back two mortgages, one for one thousand dollars, and the other for six hundred dollars. These mortgages were assigned to the partnership of Kellogg & Holtenhouse, November 20, 1866, and by them to William H. Rice, November 27, 1866, and by Rice to the defendant Harrison, March 9, 1868. Harrison foreclosed the larger of the Albro mortgages, and the foreclosure became absolute September 13, 1870, and the deed to him on the foreclosure was recorded October 5, 1870. All the other conveyances, including the mortgages and assignments, were recorded at or about the time of their respective dates; and Clark Harrison, since the foreclosure deed was obtained, has been occupying, claiming and improving the land.

The suit now before us is the Bunbury foreclosure suit. Bunbury has deceased, and the suit is revived in the name of his administrator. Prima facie the mortgage in suit is cut off by the other conveyances, none of which recognized it, and every one of which, the defendant claims, was made and taken in entire ignorance of the existence of the mortgage from Hess to Cook. The complainant has consequently been under the necessity of taking upon himself the burden of showing that Van Tassel and the several parties claiming

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through and under the deed of Hess to him had notice of the unrecorded mortgage from Hess to Cook at the time of acquiring their respective interests, and were not therefore, as against that mortgage, purchasers or mortgagees in good faith.

There is some evidence of such notice in every case, and there is also some evidence to the contrary in every case. It is obvious from what appears that the several instruments now assailed were received, and the consideration paid therefor, either in ignorance of the Hess mortgage or in disregard of it; for no inadequacy of price is shown in any instance; but complainant suggests, by way of accounting for this, that the parties, though they knew of the mortgage, supposed it to be wholly invalid because not recorded. This, though wholly improbable, is not impossible, and the evidence of positive notice must therefore be considered.

A suspicious fact, apparent on the most cursory examination of the record, is that Field has all the time been the active man in this suit in looking after the complainant's interests and in procuring witnesses, and yet he gives evidence of having personally become aware of nearly every intended conveyance, and of having personally given notice of the unrecorded mortgage. And where he did not give notice in advance, he testifies to admissions of notice as being made to himself. Now as he was not at the time claiming any interest in the Hess mortgage, but was repudiating any such interest, and may well be supposed to have felt no great desire to protect the interest of Cook, who was charging him with fraud, the fact of his being so invariably ready with his warning to purchasers, is only less suspicious than the fact that the purchasers were invariably so regardless of their interests as to pay no heed to the warning.

But in the case of the transfer of the Albro mortgages to Kellogg & Holtenhouse there is something more than suspicion; it seems impossible to read the proofs put in by the complainant without being satisfied that the story of notice is manufactured for the occasion. Kellogg, who negotiated the purchase of the mortgages for the firm, and who was

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examined as a witness concerning the transaction more than sixteen years afterwards, testified that he took the mortgages at their face value; that he cannot now recall the particulars of the transaction, but has no recollection of any notice of an outstanding unrecorded mortgage, and if he had had such notice, does not think he would have taken them. This evidence seems fair, candid and reasonable. It would scarcely be expected that one would remember all the particulars of such a transaction after such a lapse of time.

On the other hand, Field testifies that in 1866, at the lumber office of Kellogg & Holtenhouse, Kellogg asked him about his suit with Cook, and said he was talking of trading with Van Tassel for a mortgage on the Brady farm, and Field told him about the mortgage given by Hess to Cook, and that it was not recorded. This testimony was taken in June, 1879.

Field's testimony as to this transaction might well be considered fairly met and balanced by that of Kellogg; and in November, 1883, nearly a year after Kellogg had been examined, one Soosman was sworn in support of Field. He was thirty-two years of age when sworn, and he testified that some sixteen or seventeen years before he used to run a two-wheeled dray; that he once drew some lumber from Kellogg's lumber-yard for Field; that Field was there with him, and he heard a little of the conversation between Field and Kellogg. They were talking about a farm in Brady. There was a man by the name of Hess, they said, and Field told Kellogg there was a mortgage on it given by Hess that was unrecorded; that was the way the witness understood it. Kellogg was inquiring of Field about this farm; talked of buying it, but hadn't bought it. Field told him there was this unrecorded mortgage on it.

This vague and uncertain evidence, admittedly in part inaccurate, was that which was given on the direct examination. Now, when it is considered that Soosman at the time was but fifteen or sixteen years of age; that no reason is apparent why he should have noticed or taken any interest whatever in the conversation; and that, in all likelihood,

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there have been from that day to this hundreds, if not thousands, of transactions occurring in his presence every year which would be more immediately interesting to him at the time, and more likely to recur in memory afterwards,—the fact of his remembering this little transaction between others, even to the name of the stranger who was mentioned, is very well calculated to excite suspicion, if not to compel downright incredulity.

But what the witness says on cross-examination shows very plainly why the facts were remembered, and gives important insight into this part of the case. "I think," the witness says, "it was a year ago Mr. Field spoke to me about this conversation. He asked me if I remembered anything about drawing lumber for him. I told him I did. He wanted to know what kind of lumber, and I told him I thought it was flooring. Then he wanted to know if I had any recollection of a conversation between him and Mr. Kellogg. He said they were talking about a farm, and Mr. Field said to Mr. Kellogg that there was an unrecorded mortgage, I believe. I did not remember the man's name, only Mr. Field asked me if I would remember the man's name if I should hear it. I think he called him Hess. He asked me if I thought that was the name they were talking about, and I said it sounded very much like it, as near as I could remember. I believe, then, I heard him say it was in the township of Brady, in the county of Kalamazoo."

It appears, then, that the extraordinary memory was not that of Soosman, but of Field. Field, being desirous to prove that a certain conversation occurred casually some sixteen years before, is able not only to recall it distinctly to his own mind, but also to remember the very boy who by chance happened at the time to be within hearing and may therefore have heard it. This, it must be admitted, is very much more surprising than that the casual bystander, after this lapse of time, should be impressed that he recalled such a conversation, after Field had told him it occurred in his presence, and given him all the particulars. It is, of course, possible that Soosman, who apparently is the sort of man

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who might be used as a tool without being aware of it, has testified to what he was made to believe by Field were the facts, but the case is a transparent one of the manufacture of evidence. We do not in the least credit the story. Truthful witnesses do not have such extraordinary memories as we are asked to believe in here. The supposed protection of the recording laws would be a mockery if a record might be defeated by testimony such as this is.

As complainant's case fails at this point it is not necessary to consider the evidence of notice in the case of the other transfers. But it may be remarked that Hess testified that Field assisted him in making sale to Van Tassel, and advised him to keep silent about the mortgage to Cook, so that it might be made worthless to Cook, who, as Field then insisted, was the owner; and that this advice was followed, and Van Tassel kept in entire ignorance of the unrecorded mortgage. And there is much reason to believe this testimony is reliable.

The decree must be reversed and the bill dismissed with costs of both courts.

The other Justices concurred.

LOUIS RUBENSTEIN v. DUNCAN CRUIKSHANKS.

Innkeeper's liability for peddler's pack.

1. An innkeeper's liability for a guest's baggage is not diminished, but rather increased, by the fact that the guest has got too drunk at his bar to take care of it himself.

2. A guest's obligation to notify the innkeeper if he has property of extraordinary value in his baggage does not attach to a peddler stopping at an inn with his pack, or with the usual appurtenances of his business. So *held* in the case of a peddler who put up at an inn with a comrade, each having a valise and a small box, their baggage amounting to upwards of $300, and whose goods and valise were taken while in the landlord's care.

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Error to Marquette. (Grant, J.) June 5.—June 18.

Case. Defendant brings error. Affirmed.

Ball & Hanscom for appellant. An innkeeper is discharged from liability for the loss of or damage to the goods of a guest if the latter's negligence conduced to such loss or injury: *Cutler v. Bonney* 30 Mich. 261; *Elcox v. Hill* 98 U. S. 218; *Cashill v. Wright* 6 El. & Bl. 891; *Fowler v. Dorlon* 24 Barb. 384; *Hawley v. Smith* 25 Wend. 642; *Hadley v. Upshaw* 27 Tex. 547; *Kelsey v. Berry* 42 Ill. 469; "baggage" includes a reasonable amount of money in a trunk, for travelling expenses, and such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, amusement or protection: *Weeks v. N. Y. &c. R. R. Co.* 16 N. Y. Sup. Ct. 669; *Hutchings v. Western &c. R. R. Co.* 25 Ga. 63; *Dexter v. Syracuse &c. R. R. Co.* 42 N. Y. 326; *Parmelee v. Fischer* 22 Ill. 212; but it does not extend to money, merchandise, or other valuables designed for business merely: *Woods v. Devin* 13 Ill. 746; it is fraud on a railroad company, under pretense of having baggage transported to put merchandise, jewelry and other valuables in charge of its agents without notifying them of their character and value, and it will prevent recovery in case of loss, unless it occurs through gross negligence: Edw. Bailments, § 529; *Mich. Cent. R. R. Co. v. Carrow* 73 Ill. 348; *Whitmore v. Steamboat Caroline* 20 Mo. 513; *Doyle v. Kiser* 6 Ind. 242.

Sherwood, J. The defendant was proprietor of a hotel at Crystal Falls, in the county of Marquette. On the 15th day of July, 1883, the plaintiff, who was a stranger in the place and engaged in peddling, accompanied by an employee, became a guest of the defendant's, and remained at his hotel until the following Monday forenoon. On entering the hotel the defendant took charge of his baggage and goods and assigned plaintiff a room for the night, which he and his employee occupied. They each had a valise and small box which contained their baggage and goods to the amount of over $300. On Monday the plaintiff's valise and goods, while they were thus in the hotel, were stolen, and the plaintiff brought this suit against the defendant as innkeeper, to recover the value of the property lost, and obtained a judgment therefor.

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On the trial the plaintiff's testimony was to the effect that the plaintiff, at the time the goods were stolen, was stopping at the hotel as a guest; that his valise and goods were deposited in the usual place in the bar-room where baggage and the goods of guests were kept, in the care of the defendant; and while there in his care the goods were taken. On the contrary of this, the defendant testified that on Monday morning he placed the goods and valise of the plaintiff, which were lost, on a table in the care of the plaintiff.

The testimony in the case was brief, and no exceptions were taken upon the trial other than those to the charge and the refusals to charge.

That the plaintiff was the guest of the defendant, and remained at his hotel the length of time claimed, does not seem to have been contested. The question as to who had the custody of the goods at the time they were stolen was submitted to the jury, who were told by the court that, if the plaintiff had charge of them, he could not recover, and their general verdict determined that question in the plaintiff's favor.

It appeared from the testimony that while the plaintiff was at the hotel he drank liquor freely at the bar, and became somewhat intoxicated, and counsel for the defendant requested the court to charge the jury that they could take that fact in consideration in determining the negligence of the plaintiff at the time the goods were lost, and the court charged this would make no difference if the goods had been placed in charge of the defendant, and the fact that the plaintiff got intoxicated at the bar of the landlord should, if anything, cause him to be held to a stricter liability. We see no error in this charge.

It was further claimed by defendant's counsel that it was the duty of the plaintiff in this case to notify the defendant of the valuable character of the goods contained in the valise and box when he became defendant's guest. We do not think the record discloses a case making such notification necessary, although the rule, in a proper case for its applica-

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tion, we recognize. We think the charge of the court upon this subject was correct.

At the close of the evidence counsel for the defendant presented eight special requests to the court to charge.[1] We have examined them all carefully, and are satisfied that the charge of the court covers all the questions of law therein

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[1]These requests were:

First. Want of ordinary care on the part of a guest at an inn, in the care and management of his property, contributing to the loss, will exonerate the innkeeper from his liability; if, therefore, you find from the evidence, that the plaintiff did not use the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances, and in consequence thereof, the property of the plaintiff was stolen, the defendant will not be liable.

Second. If you find that any negligence upon the part of the plaintiff contributed to the loss complained of, then your verdict will be for the defendant.

Third. A person who has been guilty of ordinary negligence in the care and management of his property, which has contributed to its loss or injury, so that, but for his fault or negligence the loss would not probably have occurred, cannot maintain an action against the innkeeper where he was a guest, for such loss; although the innkeeper may also have been guilty of negligence, even to the extent of *gross negligence*, for in such a case the extent of the innkeeper's negligence cannot avail the plaintiff, who, by his fault, has contributed to the loss.

Fourth. Every person is bound to use *ordinary* care, at least, for the protection of his person and property. Ordinary care implies the use of such watchfulness and precautions as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience.

Fifth. If the plaintiff had valuable and costly goods in his pack or satchels, and gave no information to the defendant of such contents, but permitted, knowingly, the same to lie about in a public bar-room of defendant's hotel without attention from himself, or attempting to have the same taken care of by any one, it would be strong evidence of negligence on the part of the plaintiff.

Sixth. If you find from the evidence that the property in question, while at the hotel of defendant, was at one time placed where the plaintiff was unable to find it, by some third party, and that the defendant subsequently found the same and delivered it to the plaintiff, and directed the plaintiff to take care of it, to which plaintiff assented, or gave the defendant good reason to believe and think he assented, and the defendant took no further care thereof, supposing that the plaintiff had assumed the full charge of the property, but the plaintiff failed or neglected so to do, that would constitute negligence upon the part of the plaintiff; and if, by reason of that negligence, the goods were lost, the defendant will not be liable in this suit.

Seventh. If the loss of the plaintiff's goods would not have occurred, or would have been prevented, in all reasonable probability, by the exercise of ordinary care, watchfulness and prudence upon the part of the plaintiff, then the plaintiff cannot recover, and your verdict will be for the defendant.

Eighth. If the negligence which contributed to the loss was mutual upon the part of the defendant and plaintiff, no action can be sustained.

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raised sufficiently, necessary to enable the jury to properly dispose of the facts in the case. The charge given is as follows:

"*Gentlemen of the jury*: The plaintiff claims that he went to the hotel of the defendant on a certain day, and took with him as baggage a pack and valise containing goods, he being a peddler; that he went there as a guest of the defendant; that his goods were some of them lost while he was there as his guest, and therefore the defendant is liable to pay for them.

The liability of an innkeeper, gentlemen, is this: Whenever a guest goes to an inn or hotel, and becomes a guest of the hotel, and leaves his property with the hotel-keeper, the hotel-keeper is responsible for the baggage or goods so deposited. It is not necessary that anything should be said between the guest and the landlord as to the liability. It is not necessary that the guest should say to him, 'You take these goods of mine and keep them.' If he goes into the office of the hotel, and deposits his goods there,—his valise, or whatever he has accompanying him as a guest, and deposits it there, in the presence of the landlord, in the office, in the customary place where things were ordinarily deposited, so that the landlord sees it, and there receives him as his guest, the landlord's liability is then fixed for these goods, and it is then his duty to take care of them. If he seeks to escape liability in case they are lost, then the burden of proof is upon him. Mere proof that the goods are lost—mere proof even that they are stolen, without showing by whom—would not release the innkeeper from liability. Although they were stolen from his office, from the place where the guest had left them, without any negligence on the part of the guest, the innkeeper in that case would be liable. In other words, the burden of proof is entirely upon him. So, gentlemen, if you find in this case that the plaintiff went to the hotel of the defendant, it being admitted that he was an innkeeper; that he went there as his guest; that he deposited the goods which he had with him with the landlord, the defendant in the case, or in his presence, in the office of the hotel, in the customary place where such things were deposited, and the goods were lost.—I charge you that the defendant would be liable for the goods so lost, unless there was some contributory negligence, or some other agreement on the part of the plaintiff.

Now, then, if the plaintiff and the defendant made an arrangement by which the plaintiff, Mr. Rubenstein, was to

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take care of his own goods, that, then, would release the defendant in the case. If he gave the landlord to understand, by his acts or by his words, that he would take care of his own goods and relieve the landlord, the defendant in the case, from liability on that account, why, of course, he could not recover, because he would then be guilty of contributory negligence, and would have assumed to take care of his own goods. That, gentlemen, is about all there is of this case, so far as the liability is concerned. If he was received there as a guest, and the defendant, under the instructions I have given you, assumed control of his goods and of him, then he is liable, unless, under the charge I have given you, you find that the plaintiff in the case made some other agreement, or an agreement to take care of his own goods, or gave the defendant in the case to understand that he would take care of his own goods. If he did not do that, then the defendant is liable. The defendant in the case claims that there were valuable goods in the plaintiff's valise, and therefore he should have notified the defendant of that fact. It is true, gentlemen, that under certain circumstances a person may have such valuable goods in his possession that he should notify the landlord to take care of them; notify him what they were. But this would not apply to a case where a peddler went to a hotel with his pack and his valise which he used in traveling, provided he had with him the ordinary things that such a man carries for the purpose of carrying on his trade. If the plaintiff in this case had such things as are usual and customary for a man in his position to have in carrying on his trade, then the defendant assumed all the liability for what he had in there without further notice.

As to the question of damages, gentlemen, if you reach that point, it is a matter entirely and exclusively for you. You must examine the plaintiff's testimony carefully in regard to what he had there, and its value. It is his duty, of course, to give you proof from which you can say that he has lost goods of a certain value. If he has done that, and you find that the defendant is liable, then you must give him judgment for whatever you find he has proven to your satisfaction, by a preponderance of evidence, that he lost, with interest from the date of its loss to the present time."

Mr. Ball. "Your honor spoke about the principle of the duty of the plaintiff to notify the hotel-keeper of his valuable goods, if he had the ordinary material. You say that would not apply in case he had the ordinary things that peddlers have. I think it would be proper to call the attention

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of the jury to the evidence upon that point. The evidence is that there was no pack; not anything but a valise such as travelers ordinarily carry. The hotel-keeper had no way of knowing that they were peddlers, nor is there any evidence showing that he had any reason to suppose that they were peddlers, unless it was from their race. The evidence is that they had these valises, and they had two large paper boxes, such as they ordinarily carried their goods in."

The Court. "Of course we know, as a matter of fact, that there are peddlers going around the country; whether or not they all carry packs—I referred to that because I supposed they did—and the valise usually with them. You understand, gentlemen, I have charged you, if they were carrying such things as peddlers usually carry, there was no obligation on the part of the plaintiff to notify the defendant of what he had in it; but in case the things were of extraordinary value—as for instance, if a man had a tray of diamonds worth thousands of dollars in his valise—and he should say nothing about it, but leave it in the way in which the goods were left here, then he might be found guilty of contributory negligence, and it might be his duty to notify the landlord, so as to put him upon his guard, that he might take extraordinary precaution to protect property of very great value. But if it was the ordinary goods that he used in his business, then he would not be bound so to do."

Counsel for the defendant then requested the court to charge the jury, in addition to previous requests: "That the jury can take into consideration, on the question of negligence of the plaintiff, the fact of his drinking and being intoxicated at the time the goods were lost." Which last request was refused by said court.

The court then further charged said jury as follows: "I don't think that would make any difference. In fact, when the goods were once placed in his charge, the fact that the owner of the goods got intoxicated there at the bar of the landlord, if anything, I think the landlord should be held to stricter liability on that account. If he gave the landlord to understand that he would take care of his own goods, of course he cannot recover; but if he did not do so, then the landlord must be liable."

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This charge is clear, full and states the law correctly, applicable to the facts in the case.

We find no error in the record, and the judgment of the circuit court must be affirmed.

The other Justices concurred.

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Florence V. Rowe v. Joseph E. Kellogg et al.

Dissolution of attachments—Husband's interest in wife's land occupied by the family—Certiorari.

1. The powers of a circuit judge, in a collateral proceeding before him at chambers to dissolve an attachment, are those only of a circuit court commissioner; and he does not in such a proceeding exercise the full judicial authority of the court.

2. A proceeding at chambers to dissolve an attachment is a special and peculiar statutory remedy, and though not to be disfavored or construed with unreasonable strictness, it cannot be extended beyond the statute, and therefore can be resorted to only by a defendant whose interests are invaded. It is not available to creditors or to assignees for their benefit.

3. A husband, in joint possession with his wife, of land belonging to her but used as the family homestead, has, as head of the family, such an interest in the land as entitles him to complain of any unlawful interference with it; and if he is defendant in a proceeding in which an attachment has been levied on such land as his own, his interest therein is sufficient to entitle him to move for a dissolution of the attachment.

4. Land owned by a wife but occupied not only by herself but by her husband and family as a homestead is in the husband's tenancy, so long as it is so occupied, as distinctly as if leased to him.

5. Defendants in an attachment proceeding made a general assignment. The assignees moved to dissolve the attachment. A similar motion was made by one of the defendants who had an interest in the property. The dissolution was ordered at chambers, and the order was brought up for review on certiorari and sustained as to the defendant. *Held*, that the writ of certiorari was not of right under the circumstances; and that though the assignees had no statutory right to move for dissolution, yet the equities were in their favor and no costs would be allowed for or against them.

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6. The Supreme Court will not review on certiorari the conclusions reached on competent testimony as to whether an attachment should be dissolved.

Certiorari to the Circuit Judge for Kalamazoo County. (Mills, J.) June 6.—June 18.

Dallas Boudeman for plaintiff. Application for dissolution of an attachment can be made only by defendant: Drake on Attachment § 419; *Williams v. Walker* 11 Iowa 77; *Isham v. Ketchum* 46 Barb. 43; *Whipple v. Cass* 8 Ia. 126; *Cockrell v. McGraw* 33 Ala. 526; *Ketchum v. Ketchum* 1 Abb. (N. Y.) Pr. (N. S.) 157; *Allen v. Scandinavian Bank* 46 How. Pr. 71; *Tracy v. First Nat. Bank of Selma* 37 N. Y. 523.

Edwards & Stewart for defendants.

CAMPBELL, J. On the 6th of November, 1883, plaintiff levied an attachment on a considerable amount of real property belonging, or seized as belonging, to defendants. On the 9th of the same month, defendants, who were partners, made a general assignment to Edwin J. Phelps and Edwin Byles. In February, 1884, two petitions were filed to dissolve the attachment,—one by the assignees, in their own name and behalf, to remove it from the assigned property, and one by Joseph E. Kellogg, to have it set aside as to his residence, which belonged to his wife, but was occupied by the family. The only ground for suing out the writ was the belief, unsupported by any facts averred, that defendants intended to dispose of their property with intent to defraud creditors.

These petitions were addressed to the Hon. Alfred J. Mills, circuit judge, who found as a fact that there was no showing which justified suing out the attachment. While we have no authority to review his conclusions on competent testimony, we may, nevertheless, properly say that, in our opinion, he was entirely correct in his inferences, and the plaintiff's case does not appear to be meritorious. The only question which we can determine on this proceeding in certiorari, brought to review his orders dissolving the attach-

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ment, is whether the petitioners had any standing to authorize them to apply for a dissolution.

The assignees applied in their own name and on their own behalf. We have no difficulty in seeing that they are interested in having the assigned property cleared of a lien which should not have been put upon it. We are not prepared to say the circuit court may not have some power to protect them, but on this record we can express no opinion except as to the legality of the present remedy. This is not a proceeding in court, but a collateral proceeding before the judge at chambers, whose powers are identical with those of a circuit court commissioner, and who, therefore, does not, on such an application, exercise the full judicial authority of the court itself.

We have in several cases decided that this is a special and peculiar statutory remedy which cannot be extended beyond the statute, and which can only avail a defendant whose interests are invaded. *Chandler v. Nash* 5 Mich. 409; *Price v. Reed* 20 Mich. 72; *Macumber v. Beam* 22 Mich. 395; *Zook v. Blough* 42 Mich. 487. We have held in these and other cases that the proceeding to dissolve an attachment (which is not only an ex-parte seizure, but one which is very poorly guarded against gross abuse) is not to be looked on with disfavor or construed with any unreasonable strictness. But the statute, although to be construed fairly in aid of its remedial objects, cannot, as we have held, authorize the judge or commissioner, neither of whom, as such, out of court, has any implied authority to intervene in any case not within the statute, which refers to none but defendants. It is certainly desirable that those who represent creditors, as these assignees do, should have some expeditious and simple way of getting rid of unjust seizures, but we cannot see how the statutory remedy can be made to reach their equities. So far as they are concerned, we are compelled to hold that the judge had no jurisdiction, as judge, out of court, to give them relief. The order granted on their behalf must be quashed, but without prejudice to any other mode of redress, if one exists.

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As the other application was made by a defendant, and the levy was made on the property as property belonging to one or more of the defendants, there can be no doubt of his right to apply, provided he is interested at all in the property levied on. The land in question belongs to his wife, but is the family homestead. He has no technical estate in it which he can transfer to anybody else. But there can be no question, under our previous decisions, that he has a valuable and important interest which courts will protect. As head of the family he has possession jointly with his wife, and has, therefore, a right to complain of any unlawful interference. His right to join with his wife in a suit in equity to redress grievances touching the property was asserted and recognized in *Henry v. Gregory* 29 Mich. 67. The same principle was applied in ejectment against the homestead in *Hodson v. Van Fossen* 26 Mich. 68, and in a complaint against a husband for arson, in *Snyder v. People* 26 Mich. 106. The land is in his tenancy, while the family occupy it, as distinctly as if leased to him. And the fact that his wife owns the fee, and has also family interests which co-exist with his, does not make his possessory interest less actual or important.

We think the application was properly made, and that the dissolution as to him must be sustained, with costs. So far as Byles and Phelps are concerned we are not disposed to grant costs for or against them, as the equities are clearly in their favor, and we should have had some hesitation in allowing a certiorari, which is not a writ of right under the circumstances.

The other Justices concurred.

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JOSEPH C. GILCHRIST v. MARGARET MANNING AND GEORGE MANNING.

Foreclosure — Want of consideration — Compromise.

1. A man sold a sailor a rotten old boat which was described on the ship-broker's books as possessing various virtues that it did not have. The sailor and his wife gave back a mortgage on the wife's house. The boat's defects were not so apparent but that the sailor used her for a long time in the hope that he could make her do, but she was too unseaworthy, and he suffered great losses. The wife saw the man who sold the boat and claimed that part of the notes given him ought in fairness to be given up, and he referred her to his lawyer, but instructed the lawyer not to give them up until she signed a receipt for all claims resulting from the sale. She would not sign at first, and only did so on the lawyer's assurance that if she did not mean to bring a suit, signing would make no difference to her. *Held*, that this advice was not true in law as it took account of actions only, and not of defences; the compromise, therefore, could not prevent the sailor and his wife from resisting foreclosure on the grounds of a want of consideration and of fraud.

2. One who enters a vessel on a ship-broker's books as for sale is responsible for the correctness of the data of description there appearing if they were meant to be relied on and were relied on.

3. The continuous use which the purchaser of a vessel may be compelled to make of it after discovering defects, does not waive damages to which he is entitled therefor, whatever effect it may have on his right to a rescission.

Appeal from Wayne. (Chambers, J.) June 6.—June 18.

FORECLOSURE bill. Complainant appeals. Affirmed.

Lillibridge & Latham for complainant. Purchasers are estopped from alleging fraud in the sale when they have used the property and made a payment on the price and do not offer to return it: *Crippen v. Hope* 38 Mich. 344; *Craig v. Bradley* 26 Mich. 369; Bigelow on Fraud 184; 2 Pars. Cont. 780.

Dwight N. Lowell and *Otto Kirchner* for defendants. Misrepresentations, though unintentional, may operate as fraud:

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Baughman v. Gould 45 Mich. 482; *Converse v. Blumrich* 14 Mich. 108; *Steinbach v. Hill* 25 Mich. 78; *Webster v. Bailey* 31 Mich. 36; *Starkweather v. Benjamin* 32 Mich. 305; *Browne v Moore* 32 Mich. 254.

CAMPBELL, J. Complainant filed his bill to foreclose a land mortgage, made on dwelling-house property in Detroit, belonging to defendant Margaret. The court below dismissed the bill for reasons referring to want of consideration and fraud.

The mortgage and notes for $2000 formed part of a consideration of $5000 which was the agreed purchase price of a schooner named the "Cornelia Amsden." The bargain was made April 14, 1881, at Detroit, defendants then being there, and complainant also, although he lived in Ohio. The vessel was then at Alpena, and not accessible.

Complainant had entered this with other vessels for sale on a ship-broker's books, and there were placed there certain data of description. There is some conflict as to just when and how these entries were completed, but as we are satisfied from the testimony that they contain the actual representations on which the parties bought, this is not important. There is some doubt also, how far complainant intentionally and with actual knowledge to the contrary, made this showing. But as it was actually made and relied upon, and intended to be relied upon, he is responsible for the correctness of the statements.

The description of the vessel was that she measured 184 tons, was rated B 2, with lumber capacity of 225 thousand feet, and draft of 8½ to 9 feet loaded, built in 1863, with new stanchions, new bulwarks, new rails and stringers, centre-board and box, and new foresails, and all the canvas good. On these and other representations of the same sort, the defendants bought the vessel for $5000, paying $1000 down, giving notes for $2000, secured by mortgage on the vessel, and the remainder covered by the mortgage now in suit.

When Captain Manning went up a few weeks after to take possession he found the vessel outside of the pier at Alpena, loaded with lumber, and with considerable water in her hold

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frozen up. He ran her down to Sandusky and unloaded her, and thereafter continued to use her for some months for lumber. The canvas, except the foresail, was not suitable or sufficient, and he was obliged to use her as a barge, so that she was towed back and forth, and did not usually run under sail. During the latter part of the season she broke loose from the rest of the tow on an occasion off Sand Beach, and drifted ashore. The captain, his family and crew left her while she was helpless, about ten miles from land, and got ashore without serious difficulty in a small boat. The vessel became water-logged and wrecked. She was subsequently taken into dry-dock and repaired at an expense, as shown, of $4092. The material-men libeled her for repairs and she was sold in admiralty for $2100, and afterwards brought $3000 at private sale.

The testimony showed that the vessel was in very bad condition and unseaworthy; that her timbers were rotten, and that there had been no such renewal and repairs as were represented, and that her canvas was not good. The value was variously estimated, but seems to have been regarded by the most satisfactory witnesses as worth no more than $2000. We think the case shows that defendants were defrauded in the sale at least $3000, besides the personal risks in using an unseaworthy vessel, and the other losses.

We do not see how the continued use of the vessel which defendant George Manning was compelled by his circumstances to make could be any waiver of damages, whatever might be the case as to rescission. But it is, in our opinion, reasonably certain that while the condition of the canvas was soon discovered, as well as some defects in the vessel herself, the extent and dangerous character of the decay and bad condition of the hull were not fully ascertained until after the wreck, and defendants were not guilty of any serious laches in that regard. After the vessel went into dock she was made liable for repairs which defendants could not have paid for without losing more than the vessel would warrant them in paying.

Having thus a claim for reduction of their purchase liabil-

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ity, the question is raised whether they have not waived or compromised it.

In addition to the $1000 first paid, defendants paid $1000 of the notes secured by the chattel mortgage, which was destroyed by the maritime lien as enforced for repairs. In July, 1882, Mrs. Manning went down to Vermillion, where complainant lived, and had an interview with him, the result of which was that he agreed that he would give up to her the notes for $1000 which had been secured by the chattel mortgage. He claims that this was done as a final compromise of all claims for the damages which defendants claimed to have suffered. She denies that there was any such understanding, and insists they were to be surrendered unconditionally. The testimony upon this is directly in conflict. The notes were then in Detroit in the hands of complainant's solicitor, and complainant gave her a letter to him directing him to deliver her the notes, but saying further that he would write a letter the next Monday and that Mr. Latham might deliver them upon receipt of that further letter. In that letter he directed Mr. Latham to take from her a receipt in full for all claims resulting from the sale, and not to let her have the notes without it.

When she called on Mr. Latham certain things took place on which there is also some diversity of proof. Mr. Latham would not give her up the notes unless she would sign this receipt. She says, and this is not distinctly contradicted, that Mr. Latham told her the notes were not of any value, but might under some contingencies be made available by legal proceedings in case of her death. Both agree that she hesitated about signing the receipt, and it appears, we think, that she appealed to Mr. Latham whether he would advise her wrongly, and he said he would not. He advised her to sign it and, as she claims, told her it was of no importance and was not conclusive on her, but that she must go through that form before he could give her the notes. Mr. Latham's version is that when she objected to signing he asked her whether she was going to bring any suit or press any demand against complainant; and she saying she was not, he told her

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the receipt would only bind her not to do what she said she was not going to do, and would put her in no different position from her present one, and that it would make no difference to her whether she signed or not. Just before she signed she hesitated again and he told her to sign it. She asked for the letter, but he told her he wished to keep it as it related to other things as well. This letter did not claim that she had agreed or understood she was to give such a receipt, but told Latham not to give up the notes unless she did, and otherwise to keep the notes and chattel mortgage and look after the property.

It is impossible to read Mr. Latham's testimony without seeing that in this transaction Mrs. Manning acted entirely on his advice and assurances, and that he so understood. Whatever may have been his own good faith in the matter,—and it is not necessary to question it,—we have no doubt she was misled into signing a discharge which she did not understand to be any such thing. And the advice given her was not true in law, for it did not take into the account anything but active proceedings, and made no reference to any possible defence under this mortgage, which at that time she evidently supposed would not be enforced. While all persons may be expected to use some caution in their dealings, yet from what we gather from this record we think it evident that neither of the defendants had much experience in business matters, and that she was not guilty of any culpable negligence in not protecting herself more carefully than she did. A compromise which she did not suppose to be a compromise, and which was so grossly unfair in its results, cannot be held conclusive under all these circumstances.

The subsequent dealings in regard to getting this mortgage satisfied are not claimed by complainant to have materially changed her rights if she had any, and they do not improve the position of complainant. We need not refer to them. Neither do we think it necessary to expand the details of the testimony. Upon the whole case we are satisfied that the court below took a correct view of the merits, and was justified in holding that the defendants gained nothing more by

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the refusal to enforce these securities than they were entitled to.

The decree should be affirmed with costs.

The other Justices concurred.

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FREDERICK W. MYERS v. THE KALAMAZOO BUGGY CO.

Sale of good-will—Injunction against use of similar business title.

1. The "good-will" of a business establishment rests in the probability that its old customers will continue their custom and commend it to others.

2. Injunction lies to restrain partners who have sold out their interest in the good-will of a business from carrying on a rival establishment under a name so similar to that of the first as to mislead and draw off business; and the writ lies against all concerned in the new establishment. But it is hardly necessary to interfere with the delivery of mail to the latter beyond requiring them to turn over at once to the original establishment so much as may have been intended for it.

Appeal from Kalamazoo. (Mills, J.) June 6.—June 18.—Sept 23.

INJUNCTION bill. Defendant's appeal affirmed.

Edwin M. Irish and *Henry F. Severens* for complainant. Sale of a business carries the good-will it has acquired, and the right to do such incidental things as makes its value effective to the purchaser: *Hammond v. Douglas*, 5 Ves. 539; *Kennedy v. Lee* 3 Meriv. 452; *Knott v. Morgan* 2 Keen 213; *Lewis v. Langdon* 7 Sim. 421; *Dougherty v. Van Nostrand* Hoff. Ch. 69; *Bell v. Locke* 8 Paige 75; *Hein v. Lant* 10 Jur. 106; *Williams v. Wilson* 4 Sandf. Ch. 379; *Labouchere v. Dawson*, 5 Alb. L. J. 158; *Barrow v. Barrow* 7 id. 61; *Grim v. Warner* (Ia.) 15 id. 373; *Stewart v. Gladstone* 38 L. T. Rep. (N. S.) 557; the rights acquired by the purchase of the business and its good-will are of legal value, and give immunity from the vendor's encroachments, and legal redress: *Beal v. Chase* 31 Mich. 490; *Hubbard v. Miller* 27 Mich. 1; *Shaver v. Shaver* 54

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Ia. 208; *Holmes et al. v. The Holmes &c. Manuf'g. Co.* 37 Conn. 278; 14 Am. L. Reg. (N. S.) 9, 649, 713; *Newman v. Alvord* 51 N. Y. 189; *Glen &c. Co. v. Hall* 61 N. Y. 226; *Churton v. Douglas* 5 Jur. (N. S.) 887; *Devlin v. Devlin* 69 N. Y. 213; *Colman v. Crump* 70 N. Y. 573; *Godillot v. Harris* 81 N Y. 267; *Hier v. Abrahams* 82 N. Y. 520; *Woodward v. Lazar* 21 Cal. 448; *Marsh v. Billings* 7 Cush. 322; *Angier v. Webber* 14 Allen 211; *American Trade Mark Cases* 115, 376, 421, 500, 649, 671.

Dallas Boudeman and *William B. Williams* for defendants. The word "Kalamazoo" being the name of a city, cannot be exclusively appropriated by any person as a trade mark, especially when it does not indicate some quality, but only expresses the place where the goods are manufactured: *Canal Co v. Clark* 13 Wall. 311; *Brooklyn White Lead Co. v. Masury* 25 Barb. 417; *Candee, Swan & Co. v. Deere* 54 Ill. 439; *Glendon Iron Co. v. Uhler* 75 Pa. St. 467; *Wolfe v. Goulard* 18 How. Pr. 64; *Lea v. Deakin* 27 Am. L. Reg. 322; the word "Wagon" or "Wagon Company" cannot be the subject of a trade mark: *Corwin v. Daly* 7 Bosw. 222; *Town v. Stetson* 3 Daly 53; *Falkinburg v. Lucy* 35 Cal. 52; *Caswell v. Davis* 58 N. Y. 223; *Taylor v. Gillies* 59 N. Y. 331; *Popham v. Cole* 66 N. Y. 69; *Colman v. Crump* 70 N. Y. 573; *Choynski v. Cohen* 39 Cal. 501; 3 Wait's A. & D. 742; *Marshall v. Pinkham* 52 Wis. 573; the name "Kalamazoo Buggy Company" is not so similar to "Kalamazoo Wagon Company," that a person with ordinary prudence would be misled: *Snowden v. Noah* Hop. Ch. 347; *Partridge v. Menck* 2 Sandf. Ch. 622.*

Per curiam. In this case, without at this time presenting our views at length, we deem it proper to say that in our opinion the defendants, in adopting the corporate name they chose, and in any steps taken by them to draw to the new establishment the customers of the old, were guilty of acts calculated to destroy or impair the good-will sold to the complainant, and therefore not to be justified. We also think there is evidence in the case showing unfair advantage taken of mistakes made by persons who came or were brought into communication with the defendants when they supposed they were dealing with complainant, or intended to deal with him.

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We call the attention of counsel to these conclusions, and invite briefs from them as to the remedy it shall be proper or competent to give in view of them, and as to the form of the decree that should be entered.

COOLEY, C. J. The bill of complaint in this cause alleges in substance that on April 25, 1881, the complainant and Ira V. Hicks, Michael Kennedy and Moses H. Lane formed a copartnership at Kalamazoo under the firm name of the Kalamazoo Wagon Company; that under that name they worked up a large business in the sale of wagons, buggies, and cutters throughout the United States; that on April 4, 1883, said firm consisted of complainant, said Hicks and Lane, and Ida E. Lane,—the said Michael Kennedy having sold out his interest in said firm; that up to the last-mentioned date said firm had manufactured nearly 4000 wagons, buggies and cutters; that said firm had issued circulars to the trade throughout the United States containing cuts and description of goods, and had become widely known throughout the country under the name of the Kalamazoo Wagon Company, and that the good-will of said firm was valuable; that on April 5, 1883, said Moses H. Lane and Ida E. Lane executed and delivered to complainant an agreement, by which for $15,000 they sold, assigned, transferred and conveyed all of their interest in the property, money, assets and good-will, and all other property of every name and nature in and to the firm of the Kalamazoo Wagon Company, and gave to complainant a quitclaim deed to all the real estate of said firm, and that on May 16, 1883, complainant purchased the interest of Ira V. Hicks in said concern, and thereby became the sole owner of the property and assets of said concern, and has since continued said business alone, under the firm name of the Kalamazoo Wagon Company; that on May 24, 1883, said defendants, Moses H. Lane, George T. Lay, Frank B. Lay and Ida E. Lane, organized a corporation under the name of the Kalamazoo Buggy Company, under the general act authorizing such incorporation, for the purpose of manu-

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facturing buggies and cutters; that said corporation has erected buildings at the corner of the Michigan Central and Grand Rapids & Indiana Railroads, within a few feet of the buildings owned by the Kalamazoo Wagon Company, and is there engaged in manufacturing and selling the same class of goods as has been manufactured by the Kalamazoo Wagon Company from its commencement, and said Kalamazoo Buggy Company has issued circulars to the trade with descriptive cuts of the goods manufactured by it of the same general size and appearance, and containing the same cuts and general description as the circulars of the Kalamazoo Wagon Company, and has advertised their building as situated on the said railroad crossing; that since its organization a large part of the business of the Kalamazoo Wagon Company has been transacted through the mails, and before the formation of the Kalamazoo Buggy Company much of the mail of the Kalamazoo Wagon Company would come addressed to the Kalamazoo Buggy Company—people confounding the words of similar meaning—and that since the formation of the Kalamazoo Buggy Company, great confusion has arisen in the mails by reason of the similarity of names, and mail intended for complainant was constantly addressed and delivered to the Kalamazoo Buggy Company; that by locating near the Kalamazoo Wagon Company's building, and using the name Kalamazoo Buggy Company, and issuing such a circular as it has issued, the Kalamazoo Buggy Company are misleading the public and customers of complainant into the belief that the buggy company is the same concern as the wagon company, and that thereby the complainant is deprived of the good-will purchased of defendants by complainant; that Ida E. Lane is wife of Moses H. Lane, and together they own one-half the stock of the defendant corporation, and the other defendants are the father and brother of said Ida E. Lane; that said Moses H. Lane is the only one of the defendants familiar with said manufacturing business, and complainant is informed and believes that he was instrumental in getting up said circulars and selecting said name for the express purpose of deceiving

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the customers of said wagon company, and that all of defendants were acquainted with the terms of said sale before the formation of said corporation; that the name Kalamazoo Wagon Company had, by its long use, become known as a trade-mark in relation to the goods manufactured by them; that said complainant had the exclusive right to the use of the same, and that defendants had no right to use a name so similar to it as to mislead the public; that, by the acts of defendants complainant had already been greatly damaged, and that a future use of the name Kalamazoo Buggy Company by defendants would still more tend to his detriment.

The prayer of the bill is that the defendants be perpetually enjoined from using said name, Kalamazoo Buggy Company, and from conducting their business or using circulars under such name, and from taking mail from the post-office addressed to the Kalamazoo Buggy Company, or to any other name of similar import, and from doing any other act calculated to mislead the public into the belief that they are identical with the Kalamazoo Wagon Company, and for general relief.

The answer of defendants admits the formation of the partnership of the Kalamazoo Wagon Company, and the sale of the interest of defendants Moses H. Lane and Ida E. Lane to complainant, but avers that the purchase price for the property sold was based upon and was the value of the real estate and personal property, and that no price was set or paid for the good-will. The answer also admits the formation of the corporation known as the Kalamazoo Buggy Company; that such company built its building for the purpose of manufacturing at the point stated in the bill; that the defendants did issue circulars to the trade containing a description of their work, and cuts of the buggies and cutters manufactured. Their circulars were not the same as those issued by the Kalamazoo Wagon Company, but were similar to them, and were the same as issued by hundreds of other manufacturers throughout this State and the United States, and by several other firms in Kalamazoo, among which was the Kalamazoo Carriage Works, which firm was doing busi-

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ness when the Kalamazoo Wagon Company was organized; and the cuts used were identical with those used by other manufacturers; that it was the usual custom of manufacturers to advertise their business by the use of such cuts and circulars, and there was no way of properly advertising them except in that way. It avers that the Kalamazoo Wagon Company nor any other person or firm had any exclusive right to the cuts or the particular style of circulars, and that every person engaged in the business was equally entitled to use them; that the Kalamazoo Buggy Company in fact made a better grade of work than complainant, and their mode of numbering their cuts was so different from complainant's that no one could be misled by the circulars; that at the time of the sale to complainant it was well understood by said complainant that defendants would erect a new manufactory on the very lots on which they did erect the same, and no objection was made to it by him, and that either of the parties who might sell out had the right to start a new business of the same kind.

The defendants deny that they selected the name Kalamazoo Buggy Company to injure the Kalamazoo Wagon Company or its good-will, but say that they selected the name because it correctly represented their business and the village in which they were located, and deny that complainant has been at all injured by the use of such name, or the good-will of his business impaired. They say that defendants have never held out to the public, or to any one, that their concern was the same as the Kalamazoo Wagon Company, but, on the contrary, they held out and advertised that they had no connection with that company, and they deny that the public generally was deceived or misled by any similarity in the names. They deny any right of complainant to the use of the said name, Kalamazoo Wagon Company, and also deny that said name is a trade-mark. They deny that since the formation of the defendants' corporation any considerable confusion of the mails of the two concerns took place. They say that in the beginning of defendants' business a few letters came to them intended for the Kalamazoo Wagon Company,

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which were immediately delivered to complainant, and that since that time to the time of commencing suit no such difficulties had arisen, and that after defendants' corporation had become known to be in existence no confusion had existed. They aver that immediately after the sale to complainant, and before defendants went into business under the name of Kalamazoo Buggy Company, the complainant himself notified by circulars all of the customers and former customers of the Kalamazoo Wagon Company that the two companies, the Kalamazoo Wagon Company and the Kalamazoo Buggy Company, had no connection with each other, but were separate institutions. They insist that defendants have not only established their business under a corporate name, but have done so fairly and honestly, and they believe they had the perfect right to the use of their corporate name in carrying on their business; that they have not by the use of said name led any one to leave off trading with the complainant, and have done nothing except in the way of a fair competition to obtain any trade which might otherwise have gone to the complainant. Defendants further deny that complainant has stated any case in his bill which entitles him to relief in a court of equity, and pray the same benefit as if they had demurred.

A temporary injunction was granted on filing the bill, which afterwards, on the coming in of the answer, was dissolved. When the cause came to a hearing on pleadings and proofs, a decree was rendered in favor of complainant, perpetually enjoining the defendants from carrying on their business under the name of the Kalamazoo Buggy Company, from distributing and issuing circulars under that name, or soliciting custom by traveling salesmen or otherwise from the persons who were the customers of the Kalamazoo Wagon Company on April 5, 1883, under the name of Kalamazoo Buggy Company, and from receiving mail from the post-office addressed to the Kalamazoo Buggy Company, providing complainant delivered mail received by him in the name of Kalamazoo Buggy Company, which is intended for defendants, to them. The defendants appeal.

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We are satisfied that the circuit judge was right in his conclusion that the complainant has suffered serious wrong at the hands of these defendants. He purchased of Lane and his wife, for a consideration the adequacy of which is not disputed, all their interest "in the property, assets, money, good-will and all other property of every name and nature in and to the firm of the Kalamazoo Wagon Company;" and he was entitled to be put in possession of what he bought. The good-will was a substantial part of the purchase, and purposely to take any steps to prevent his receiving the benefit of it was a wrong of the same nature as would have been the retention of some portion of tangible property belonging to the stock of the company. This good-will is to be found in the probability that the old customers of the establishment whose dealings with it have been satisfactory to them will continue their custom and commend it to others; and if those customers were to be invited and enticed away from the old establishment, and especially if they were to be deceived into dealing with a new establishment under the belief that it was the old, the value of the business thus lost would be so much taken from the value of the good-will which had been bought and paid for, and the invitation, enticement or deception that caused the loss would constitute a wrongful appropriation of property. Now the evidence, as we think, leads irresistibly to the conclusion that before their sale to complainant was made, and in contemplation of it, the Lanes had bought in the name of another a lot in the immediate vicinity of the existing establishment, upon which they had planned to erect buildings and put in machinery for the carrying on of the same business the Kalamazoo Wagon Company was engaged in, under a name closely resembling that which belonged to and was important to the protection of the business they had transferred, and that this was done in the hope and expectation that by so doing the benefit of the good-will they had sold might be in part appropriated by themselves. We think that to some extent this purpose has been accomplished by them; that some confusion in the mails has resulted, and that in some instances parties who intended dealing with complainant have been misled into dealing with defendants. And

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we also think that while complainant should have redress, he is entitled to the same remedies against the other defendants as against the Lanes. *Beal v. Chase* 31 Mich. 490.

But while the wrong is plain, the remedy is not so obvious. The circuit court enjoined the defendants "from conducting the business of manufacturing carriages, buggies, wagons and cutters under the name of the Kalamazoo Buggy Company, either as designating a corporation or other business association of said defendants, and from issuing and distributing circulars and business cards under that name, and from soliciting custom by the agency of traveling salesmen or otherwise from the customers of the firm known as the Kalamazoo Wagon Company who were customers of this firm on the 5th day of April, 1883, in any manner, under the name of the Kalamazoo Buggy Company, and from receiving mail from the post-office addressed to the Kalamazoo Buggy Company," with a provision requiring complainant forthwith to deliver to defendants any mail received by him that was intended for defendants or either of them. This decree we think is right except the clause respecting the mail. It is not at all likely that any great number of letters intended for complainant will fall into the hands of defendants by reason of being erroneously addressed to the Kalamazoo Buggy Company, and it is not suggested or intimated that the large majority of letters and other mail matter received at Kalamazoo to that address will not be intended for defendants. Under such circumstances to require all such mail to pass through the hands and under the scrutiny of complainant would cause a greater wrong than it would redress. This portion of the decree must therefore be so modified as to leave the defendants to receive all such mail, but requiring them forthwith to deliver to complainant all that shall appear to have been intended for him or for the Kalamazoo Wagon Company.

With this modification the decree will be affirmed, and complainant will have costs of both courts. The redress awarded may be inadequate, but it seems to be all the case will admit of.

The other Justices concurred.

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Aaron G. Peer v. James Ryan.

Experts—Presumption of negligence—Special questions.

1. An expert's qualifications depend on his experience and not upon his profession: a man may know something of horses without being a horse-doctor.
2. The owner of a stallion was sued for the value of a mare that was ruined by service per rectum. *Held*, error to require plaintiff to show that such service was due to defendant's negligence; the inference would be that it was.
3. Special questions requiring the jury in an action of negligence to specify what defendant did or omitted, are erroneous; if the jury is satisfied that he was wanting in care plaintiff is entitled to their general verdict.

Error to Huron. (Wixson, J.) June 11.—June 18.

Case. Plaintiff brings error. Reversed.

Engle & Engle for appellant.

Winsor & Snover for appellee.

Cooley, C. J. The defendant was owner of a stallion by which a valuable mare belonging to the plaintiff was served. The plaintiff claims that the mare was fatally injured in the operation through the entry of the rectum, and that this occurred by the negligence of defendant's groom, and he sues to recover her value.

After proving the injury the plaintiff, to show negligence, put upon the stand a man who testified to having had very long experience as owner and manager of stallions, and asked him whether, under the circumstances, if the service had been properly performed such an injury could have been received. The question was objected to and ruled out because the witness was not a veterinary surgeon. This was error. It was the experience of the witness that qualified him to express an opinion upon the question, and not his having taken up a

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profession which might or might not have given him information or experience of equal value.

Evidence was given that immediately after the mare was served, she was in great pain and commenced sweating on her sides and loins, so that the perspiration rolled off of her. A witness who testified to large experience in such cases was asked to state whether he ever before saw a mare in the same condition directly after being served with a horse, but as the witness made no claim to being a horse-doctor the question was ruled out. The error in this case was the same as in the other.

We also think that the manner in which the judge submitted the case to the jury was well calculated to lead the jury to suppose that more proof was required of the plaintiff than could be demanded by law. The judge told the jury that, to entitle the plaintiff to recover, he must show—*first*, that the entry was made of the rectum as claimed by the plaintiff; and *second*, that it was so made by reason of the negligence or want of care of defendant's groom. But we think that if the rectum was entered the inference must be, in the absence of any evidence to show other cause, that the groom was wanting in due care.

The judge also submitted to the jury the following special questions:

1. Do you find from the evidence that defendant's groom omitted any precaution that he might have taken in serving the plaintiff's mare, and if so, what?
2. Do you find from the evidence that defendant's groom did anything in serving plaintiff's mare that he ought not to have done, and if so, what?

Neither of these was proper. The effect of submitting them was likely to be to impress the minds of the jury that before they could return a verdict for the plaintiff, they must be able to specify and agree upon the particular act or omission of the groom from which the injury resulted. But this would be error. The jury might have been satisfied of a want of care, deducible from all the circumstances, without being able particularly to describe or define it; and if they

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were convinced of such want of care, and believed the injury resulted from it, the plaintiff was entitled of right to their general verdict.

A new trial must be ordered.

The other Justices concurred.

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PATRICK TREGENT v. ABRAM MAYBEE ET AL.

Pleading—Election of counts—Waiver of tort and suit in assumpsit.

1. Election between counts need not be required where, in assumpsit for money obtained by defendant through fraud, the common counts are joined to a special count waiving the tort.
2. A count in assumpsit, waiving a tort on which it rests, may properly state the facts which constitute the tort, as they will have to be proved.
3. Plaintiff may join all his causes of action in one declaration, if in separate suits he could recover on each in the same form of action and on the same proofs.

Error to Wayne. (Chambers, J.) June 11.—June 18.

ASSUMPSIT. Defendants bring error. Affirmed.

James H. McDonald for appellants.

Seth E. Engle for appellee.

SHERWOOD, J. This case has been twice in this Court before. See 47 Mich. 495 and 51 Mich. 191. The facts in this record are not essentially changed from those appearing in the other cases. The plaintiff on the first trial had a verdict of $180, which was reversed in this Court. On the second trial the defendants, under the instructions of the circuit judge, obtained the verdict, and on appeal to this Court the judgment was again reversed. Another trial has been had at the circuit, in which the plaintiff recovered a judgment for

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the sum of $242. From this judgment the defendants appeal, and the case is again before us on error.

The defendants asked the court to require the plaintiff's counsel to elect as to which of the counts he would rely upon for a recovery in the case. The plaintiff had joined with his special count the common counts; the special count charging the fraudulent obtaining of the moneys sued for, and waiving the tort. The plaintiff claimed there was a misjoinder of counts. The court refused to compel the election, and this is alleged as error. We think the ruling of the court was right. Under our statute and practice assumpsit in cases of this kind may be brought, and any other causes maintainable in the same form of action may be joined with it in the same suit.

It is no ground of objection that the facts constituting the wrong are stated in the count wherein the tort is waived; they must be proved to entitle the plaintiff to recover and therefore must be stated in the declaration. The defendant is deprived of no right by the joinders complained of. He is permitted to make any defense to the count based on the tort that he might had the common counts not been added, and there is no reason why plaintiff should not join all the causes he has, when recovery may be had in each in the same form of action if separate suits were brought. Under the declaration in this case the plaintiff was entitled to recover under either count if he could make his proofs.

The plaintiff showed by his evidence he got nothing for the money he parted with, and the facts tended to show fraud and deception practiced by Baker in obtaining the money, and the circumstances connected the defendants with some of Baker's acts, and they received a part of the money obtained on the shipping receipt. If the defendants acted in good faith in what they did, certainly the plaintiff was entitled to have the flour the receipt called for, and when the defendants sold it to others unauthorized by plaintiff they became liable to him therefor in assumpsit under the common counts, and upon the law thereon thus presented to the jury they recovered in the case, and under the charge of the court the

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jury gave their verdict for the plaintiff, which we do not feel it our duty to disturb.

The great vigilance shown by counsel for defendants in the preparation of his clients' case, and the care with which he has presented it for our consideration is highly commendable. Still, in a review of all the points made and errors assigned, we have failed to discover any so far prejudicial to the rights of the defendants as to require a reversal of the judgment; and it must therefore be

Affirmed.

The other Justices concurred.

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SMITH W. OSTERHOUT ET AL. v. WILLIAM T. JONES.

Taxation of lumber piled for shipment.

Lumber upon the premises of the manufacturer and under a contract of sale to dealers whose place of business is elsewhere, is not taxable where it is, as if in a place of "storage," especially if anything remains to be done to complete the transfer to the purchasers.

Error to Mecosta. (Fuller, J.) June 11.—June 18.

REPLEVIN. Plaintiffs bring error. Reversed.

Thos. J. O'Brien for appellant.

M. Brown for appellee.

CAMPBELL, J. The question presented by this record is whether plaintiffs were lawfully taxable in 1882 for a quantity of lumber in the yard of a saw-mill at Morley, in Mecosta county. The plaintiffs are a firm residing in Grand Rapids, having no agency or place of business at Morley. They are taxed on the ground that they occupied a place of storage there.

The lumber in question was manufactured by a local firm

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named Higbee & Hugh, and plaintiffs' interest was derived under a contract whereby Higbee & Hugh were to sell them all of the white pine lumber and eighteen-inch shingles which that firm should manufacture at their mills up to November, 1882. Prices were fixed at certain rates named, and the lumber was to be assorted and cross-piled, and again assorted and loaded upon the cars to plaintiffs' order from time to time. It was to be inspected when loaded on the cars, and that inspection was to be final. Payments were to be made of 75 per cent. by estimate in the piles, and the remainder once a month as fast as shipped. Title was to pass on payment of the 75 per cent.

Assuming that this amount had been paid, which however does not plainly appear, it is nevertheless evident from the undisputed facts that this lumber was not stored in any place occupied by plaintiffs, and that it remained in the premises near the mill awaiting delivery and transit. It was in custody of the mill-owners, who had active duties to perform in regard to it, and who were to have further payments on shipment and inspection. The case is, if anything, stronger than the recent one of *Monroe v. Greenhoe*, ante, p. 9, where the lumber had been removed from the mill to the side of the railway track. Here it had never changed custody, and was under the continued control of the manufacturer for further services and forwarding. As we have been called on heretofore to construe the statute we need not repeat the views already sufficiently expressed. We do not think there was any such use or occupancy by plaintiffs of the place where this lumber was piled as could in any way localize their interests at Morley, under the language of the law concerning such occupancy.

The judgment must be reversed with costs, and a new trial granted.

The other Justices concurred.

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EDGAR R. ALDRICH v. ALIDA ANNIN AND BYRON W. FORBES, ADMINISTRATOR.

Claims against decedents not enforcible in equity.

1. Claims against the estate of a deceased person can only be enforced by statutory proceedings in the probate court; and in such proceedings all concerned are bound by the proper publication of notice.
2. A creditor of a decedent can take out letters of administration upon his estate if others do not do so.

Appeal from Washtenaw. (Joslyn, J.) June 12.—June 18.

ACCOUNTING, ETC. Defendants appeal. Reversed.

Frank Jones and *Chas. R. Whitman* for complainant.

Sawyer & Knowlton for defendants. Unadjudicated claims against an estate cannot be adjudged in chancery and converted into demands payable out of the assets of the estate; they must be adjusted and allowed either by commissioners or judge of probate or on appeal, and until the estate is charged with them there is no basis for a bill against a decedent's fraudulent conveyances in order to recover moneys to pay them: *O'Connor v. Boylan* 49 Mich. 209–213; *Bank v. White* 6 N. Y. 236–252; *Beck v. Burdett* 1 Paige 305; *Reade v. Livingston* 3 Johns. Ch. 481; *McElwain v. Yardley* 9 Wend. 548–559–66; *Clarkson v. DePeyster* 3 Paige 321–2; *Brinkerhoff v. Brown* 4 Johns. Ch. 671–6–7–8; *Rhodes v. Cousins* 6 Rand. 188; *West v. M'Carty* 4 Blackf. 244; *Smith v. Thompson* Walk. Ch. 1; *Rynearson v. Turner* 52 Mich. 7; *Duberry v. Clifton* Cooke 328; *Williams v. Brown* 4 Johns. Ch. 682; *West v. M'Carty* 4 Blackf. 244.

COOLEY, C. J. Complainant is owner of a note given by James E. Annin, June 2, 1873, and due in one year from date. Annin died August 14, 1876, leaving his wife, the defendant Alida, surviving him. No administration has ever been had upon his estate, and it is said he left no property except the note hereinafter mentioned. In 1874 James E. Annin conveyed his real estate to Thomas Shekel, an uncle,

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and in 1875 Shekel gave a note payable to Annin, or in case of his death to his wife, for a sum then remaining unpaid of the purchase money. Shekel died in 1881 and Alida Annin presented the note as a claim against his estate, and it was duly allowed in her favor.

The present suit is a suit in equity to reach this allowance and have it applied in satisfaction of complainant's note. Complainant claims that the allowance in favor of Mrs. Annin is assets of her husband's estate, and therefore in equity a fund for the satisfaction of complainant's note, and in his bill he prayed that it be applied to that object so far as necessary. The bill was filed in March, 1881. The defendants demurred but the demurrer was overruled, and the case was afterwards heard upon pleadings and proofs.

The circuit court entered a decree in accordance with the prayer of the bill, and the defendants appeal.

We do not see how this decree can be sustained. Creditors of a deceased person are to enforce their claims against his estate through proceedings in the probate court, and the statute makes ample provision for the purpose. If other parties interested fail to take out letters of administration the creditor himself may do so, and such proceedings will then be taken as will adjust all equities on the principle of relative equality. If the creditors might severally go into equity for the enforcement of their demands, the purpose of the Statute of Distributions would be defeated, and estates might be eaten up in litigation. It may be that in this case complainant is the only creditor, and the allowance which it is sought to reach the only asset; but the way to ascertain who are interested and what the assets are, is to take the statutory proceedings. Of those proceedings all concerned, when the proper publication is had, must take notice; but nobody is a party or bound to take notice of this suit except the parties named in it, and nobody else would be concluded by the decree. It might happen, therefore, notwithstanding the decree in this suit, that other claimants would appear, with a right to share in the assets equal to that of the complainant.

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But the statute intends that in a single proceeding all these matters shall be adjusted.

The decree must be reversed and the bill dismissed.

The other Justices concurred.

Emil S. Heineman et al. v. Albert Steiger.

Trover for goods obtained by deceit.

1. Trover lies for goods obtained by defendant through fraud or deceit practiced on plaintiff; and the plaintiff need not have accepted every statement as literally true or count on any precise words. And fraud outside of any written statement made, may be considered by the jury.

2. In trover for goods sold upon representations by the purchaser as to his solvency, the jury have no right to assume that the plaintiff did not rely on the representations in making sale, if there is testimony to support his claim that he did, and none to the contrary.

Error to Macomb. (Stevens, J.) June 13.—June 18.

Trover. Plaintiffs bring error. Reversed.

Levi T. Griffin (*Griffin & Warner*) for appellants. A jury must not disregard its instructions: *Gibson v. Troutman* 9 Ill. App. 94; *Robertson v. Dodge* 28 Ill. 161; *Evans v. George* 80 Ill. 51; *Swan v. People* 98 Ill. 610; *Jourdon v. Reed* 1 Ia. 135; *Carlin v. C. &c. R. R. Co.* 37 Ia. 317; *Smith v. Slocum* 62 Ill. 354; *Grand Chute v. Winegar* 15 Wall. 355; *Jewell v. Parr* 13 C. B. 909.

Silas B. Spier and *N. B. Eldredge* for appellee. A sale cannot be treated as void for the purchaser's fraud in making a statement as to his reliability, if he made it intending to pay for the goods and believing his statement to be substantially true but not received as a precise one, and if he had no intent to deceive: Addison on Torts 1005 (1175); *Ormod v. Huth* 14 M. & W. 664; *Marsh v. Falker* 40 N. Y. 562; *Weed v. Case* 55 Barb. 534; *McCrackan v. Cholwell* 4 Seld. 133; *Patton v. Campbell* 70 Ill. 72; Bigelow on

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Fraud 1, 37; Sackett on Ins. to Juries 156; *Oswego Starch Factory v. Lendrum* 57 Ia. 573; Cooley on Torts 501; *Eames v. Morgan* 37 Ill. 260; *Nelson v. Taylor* 46 How. Pr. 355; *Stone v. Denny* 4 Met. 151.; *Avery v. Chapman* 62 Ia. 144; *Houghtaling v. Hills* 59 Ia. 287; Ker on Fraud 57; Bishop on Contracts §§ 191–4, 197–9, 203, 4–15–17, 23; *Beebe v. Knapp* 28 Mich. 53; *Stone v. Covell* 29 Mich. 359.

CAMPBELL, J. Plaintiff brought trover against defendant for the conversion of certain goods, the ground of the claim being that he obtained them by false pretenses and representations. As the declaration is not specially framed on the representations, but treats the transaction as one which made the sale voidable for such fraud as entered into it, the errors assigned must be considered in the light of the record as made up.

The admitted facts are that defendant who was a dealer in mixed goods at Mt. Clemens had, previous to October 19, 1881, purchased clothing of plaintiffs on different occasions on credit, and at that time one note of $139.75 was nearly due, and others of amounts not very different were to become due at various times within the next three months, making, together with the one referred to, something more than $500. On the 19th of October, 1881, defendant came to plaintiff's store in Detroit and selected about $300 worth of goods. Plaintiffs desired him to give them a written statement of his affairs, which was taken down from his representations and signed. This gave his resources as follows: Stock in store, $8000; collectible claims, $900; thus making an aggregate of $8900. He gave his debts as being $1700 to Edson, Moore & Co.; $700 to A. R. & W. F. Linn; $300 to various boot and shoe dealers; $800 to plaintiffs; $300 for sundry small articles, and $200 to bank. He further stated that he owed not to exceed $4000, and had not given and did not intend to give any chattel mortgage or security to anybody, and was insured between $3000 and $4000. The statement then proceeded: "I make this statement as being true, and for the purpose to obtain credit for goods of Heine-

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man, Butzel & Co.; also that they will accept my notes after some of my open account is past due."

On that day the plaintiffs sold him goods to the amount of $300.50, on four months' time, and afterwards sold him some small bills of no great amount. The sales were at regular wholesale market prices. Plaintiffs, by the two who were present at the time, swore the sales were made in reliance on this statement.

It appeared on the trial and was not contradicted, that at this time, in addition to purchases made on that same day, the exact hour of which is uncertain, he owed Edson, Moore & Co. very nearly $2200, and the Linns about $300 beyond what he stated. He also owed his father-in-law $600, with interest since some time in 1879. There was testimony also tending to show that his assets were much less than he stated.

He paid plaintiffs the notes for the older debts during the year 1881 and January, 1882, but made no payment on the October purchase, which fell due in the latter part of February. On the 3d of March he gave his father-in-law, Pontiff Gwinn, a chattel mortgage for $1100 on this stock, which he claimed was made up by the debt of $600, and a balance due Buhl & Co. for advances on straw braid, and he gave Edson, Moore & Co. and the Linns a mortgage for over $4000. There had been purchases of goods since October of over $3000. He says he remained in possession as their agent. They deny that they took possession or employed him as such. They subsequently sold out their debts to Gwinn, the father-in-law, who took a transfer from defendant of the whole establishment for $100, and he sold out to another person.

The testimony concerning this range of transactions had more or less tendency to show the falsehood of the October statement, and was claimed to show fraudulent purposes and acts beyond this.

Defendant did not dispute the falsehood of the written statement, but undertook to explain it by saying that he gave the plaintiffs to understand it was not a correct statement, and that he would rather examine his books and give

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a correct one, but that they said they knew it was not correct, and they merely wanted him to sign it. He denied any wrong intent, but said he meant to give a statement as near as he could, and to do so for the purpose of getting the goods.

Objection was taken to the admission of several answers concerning his particular intentions, and to the exclusion of some questions propounded. The chief exceptions however go to the charge, which is claimed to be misleading and contradictory to other rulings.

The court after setting out the fact that the statement was made, and that it was untrue in several particulars named which were held to be material, told the jury that defendant was bound by it as made, whether he knew it was false or not.

The judge then proceeded to charge the jury that if plaintiffs sold the goods and gave the credit, relying and acting on the truth of the statement, and that it was made by defendant, as he states it was, for the purpose of enabling him to get the goods on credit, plaintiffs were entitled to recover their value.

But he then told them that if they should conclude the plaintiffs did not rely upon the truth of the statement, and were not misled or deceived by such statement and induced thereby to part with the possession of the goods, their verdict should be for the defendant.

We think this charge was not correct. There was no testimony whatever from which the jury had a right to assume the plaintiffs did not make this statement, and its truth, in substance at least, a condition of the sale. Their testimony is positive and unequivocal as to their own understanding. Defendant swears that it was given by him and made as correct as possible, because they required it, and in order to get the goods. It cannot be fairly inferred from his testimony that they were not made to believe it was substantially correct, although not absolutely so. There was no testimony tending to show that he made any subsequent effort to undeceive them before he made the chattel mortgage to Gwinn,

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which he testifies he not only prepared and executed without any desire or request from him, but made it for about $500 more than he owed Gwinn, without any previous understanding as to its execution or purpose. Under this charge it is impossible to reconcile the verdict of the jury with its first instructions, without assuming that there could be no recovery unless plaintiffs supposed the statement was literally and not merely substantially correct. The judge treated it as if this had been a special declaration on a written instrument which was not literally proved, and as if this was the only ground of redress. But upon all the facts there was room for examining into all the circumstances collateral to the statement, as well as the statement itself.

There was no room for contending that plaintiffs did not receive this statement as a basis of credit, or that defendant did not intend it for that purpose. This is not merely recited in the paper, but it is shown by defendant himself. In an action based on legal or actual deceit, and not counting on any precise words, if the plaintiffs are substantially misled by fraud to their injury they have a right to complain, even though they do not suppose every averment made to them is literally true. And if there was fraud outside of the mere falsehood of the written statement, there is no legal reason why it should be eliminated from its surroundings.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

CHILTON THOMPSON v. THE CIRCUIT JUDGE FOR SHIAWASSEE COUNTY.

Affidavit of publication in chancery.

An affidavit of publication in chancery must state the facts of inquiry on which it bases the conclusion therein expressed that defendant is absent from the State or concealed within it.

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Mandamus. Submitted June 17. Denied June 18.

A. R. McBride for relator.

PER CURIAM. An affidavit for publication in a chancery cause which merely states that the affiant cannot find the defendant in the State by reason of his absence from the State or of his concealment within it, is not sufficient. The affidavit should state the facts of inquiry and investigation, so that the court can see that the conclusion that the party cannot be found for the reason stated is a reasonable one upon such facts.

ANN PASSMORE v. THE CIRCUIT JUDGE FOR SAGINAW COUNTY.

[See 50 Mich. 626.]

Transfer of causes.

A motion for an order to show cause why a case should not be transferred was denied where the circuit judge, in the exercise of his statutory power, had passed upon certain disputed facts.

Motion for order to show cause. Submitted June 10. Denied June 19.

Wm. H. Sweet and *Wm. A. Clark* for relator.

PER CURIAM. If this were an original application made to us to transfer the cause with power on our part to make the transfer, we should probably feel bound to grant it; but as there are some disputed facts, and the circuit judge has passed upon them in the exercise of the statutory power, we are not clear as to our right to interfere, and will therefore decline to interfere.

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HENRY STACK v. ADONIRAM J. SMITH, JUSTICE OF THE PEACE.

Replevin—Election of judgment for value.

Election to take judgment for value in replevin before a justice, cannot be exercised, as matter of right, after an adjourned day on which the plaintiff discontinued and defendant did not appear.

Motion for order to show cause. Submitted June 17. Denied June 19.

Cook & Daboll for relator.

PER CURIAM. If the relator had appeared on the adjourned day of the suit, and elected when plaintiff discontinued the suit, to take judgment for the value of the property replevied from him, he would have been entitled to it; but he did not appear there. He could not appear there afterwards and demand that judgment.

Motion denied.

THE PEOPLE v. AUGUSTUS G. COLE.

Value of stolen property.

Value of stolen property is fixed by rates prevailing at the time and place where the theft was committed, and not in some neighboring city.

Error to Oakland. (Stickney, J.) June 19.—June 19.

LARCENY. Respondent brings error. Affirmed.

W. N. Draper and *Thomas J. Davis* for appellant.

Attorney General *Van Riper* for the People.

CHAMPLIN, J. Respondent was convicted of larceny of property exceeding twenty-five dollars in value. The offense

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was committed in Oakland county and within two miles of the city of Pontiac. The circuit judge excluded evidence of the value of the property in the city of Detroit, and confined the proof to the value at the time and place when and where the larceny was committed.

There is no error in the record, and the judgment is affirmed.

The other Justices concurred

The People v. Henry Blake.

Jurisdiction to execute sentence.

1. A case removed to a court of record for review becomes subject to its rules of practice; and the party removing it cannot take advantage of delays necessarily incident to the operation of those rules to contest, on that ground, the jurisdiction to proceed.

2. A person sentenced by a justice to ten days' imprisonment removed his case by certiorari and afterwards obtained a stay of proceedings in order to take out a writ of error. The conviction was affirmed and the case remanded, after which the period of imprisonment ran four times before the sentence could be carried out. *Held*, that this did not divest the jurisdiction to put it into execution.

3. The judgment to be enforced on its affirmance upon certiorari to a justice is that of the justice himself; the statutory provision that when it is affirmed the circuit court shall order it to be executed, does not preclude such delays as may be necessary to take the case to the Supreme Court; nor do such delays divest jurisdiction to enforce it on final affirmance.

Error and certiorari to Ottawa. (Arnold, J.) June 19.

Complaint for violation of liquor law. Conviction affirmed.

Attorney General *Van Riper* for the People.

George C. Stewart for respondent.

Campbell, J. Respondent was convicted before a justice, and sentenced to pay a fine and be imprisoned for ten days.

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He removed this to the circuit court for the county of Ottawa, where that court entered an order of affirmance, and granted a stay of proceedings on his request to enable him to bring error, which he did. This Court affirmed the judgment, and the case was remanded. [52 Mich. 566.] On the first day of the next term at the circuit, the prosecuting attorney moved for sentence, and after hearing objections the court ordered respondent to be remanded to the county jail for the period fixed in the justice's judgment, and subsequently granted another stay to enable him to come to this Court again to object to this sentence. His claim is that the judgment of affirmance in the circuit court on the certiorari was illegal, because not including a sentence of remand; that the stay of proceedings then granted ran out when the remittitur from this Court was filed, in February 1884; and that more than forty days had since expired.

As it appears that the respondent was represented by counsel, and actually opposed the entry of sentence, we do not comprehend the suggestion that the motion was made ex parte.

The objections appear to us frivolous. As declared in *People v. Hobson* 48 Mich. 30, the justice's judgment, when affirmed, is the one which is to be enforced. The statute provides that when it is affirmed the circuit court shall order the sentence to be executed. But this cannot preclude that court from such delays as the party may desire, to provide for appellate proceedings to this Court; neither does it put such judgments of affirmance on any worse footing than other convictions, as to the time of execution, so as to deprive that court of jurisdiction by temporary delay. When a convicted person procures the removal of his cause into a court of record, he comes under the practice rules of that court, and cannot invoke delays of his own procurement to get rid of that jurisdiction.

When the case went back from this Court, it went back affirmed as to the very circuit court order which is now claimed to have been illegal on grounds which would have been as good then as now. After the cause was remanded the cir-

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cuit court had power, and it was its duty, to proceed to order the justice's judgment to be carried out; and its action was correct, and must be

Affirmed with costs.

The other Justices concurred.

CATHARINE FRANK v. JOHN J. SPEED, WAYNE CIRCUIT JUDGE.

Division of costs.

How. Stat. § 8974 gives costs to the plaintiff only if he recovers on any count of a declaration where all are for the same cause of action; where otherwise, to defendant also, if he recovers on any count. A woman helped turn a man off her husband's premises, and he assaulted and afterward arrested her. She sued him, counting on assault and battery, malicious prosecution and false imprisonment, but recovered on the first two only. Costs were allowed on the third to defendant. Mandamus to set aside this allowance was *denied* on the ground that it did not appear that the causes of action were substantially the same.

Motion for order to show cause. Submitted and denied June 24.

Relator, having aided in forcibly ejecting one Wiegert from premises belonging to her husband, was assaulted by him, and afterwards brought before a justice of the peace. Being discharged on examination, she sued Wiegert in the circuit court, counting upon the assault and battery, on malicious prosecution and on false imprisonment. The case was left to the jury on the first two counts, and on these they found for the plaintiff, but on the third they were instructed to find for the defendant, and did so. On defendant's motion costs were allowed him on the third count, and plaintiff, relying upon How. Stat. § 8974, asks for mandamus to set aside this order.

Section 8974 provides that where the several counts of a declaration rest upon the same substantial cause of action,

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and plaintiff recovers upon some of them, he shall receive costs, but that defendant shall recover no costs even though he should have judgment on another count; but where the counts are not all for the same cause of action, each shall be allowed costs.

Wm. B. Jackson and *H. A. Chaney* for the motion.

THE COURT denied the order, being of opinion that it did not satisfactorily appear that the count on which the defendant had verdict in his favor was for the same substantial cause of action for which the plaintiff recovered.

DAVID PRESTON v. FITZWILLIAM H. CHAMBERS, WAYNE CIRCUIT JUDGE.

Justice's Courts—Fees—Dismissal of appeals.

Act 148 of 1883 requires one who takes an appeal from a justice to pay, on taking it, the fee due to the clerk of the appellate court. *Held*, in a case in which this was not done at that time, but where the fee was paid when the justice's return was made, that the appellate court had discretion to refuse to dismiss the case for non-compliance with the statute.

Motion for order to show cause. Submitted and denied June 24.

Relator recovered a judgment before a justice, and on the fifth day thereafter an affidavit and bond for appeal were filed, and the justice was paid his costs and the fee for making return. He was not however paid the fee of three dollars to be paid by him to the clerk of the appellate court on making his return, as prescribed by Act 148 of 1883. He made his return over two months later, and the appellant's attorney then paid the clerk's fee himself. A motion to dismiss the appeal for non-compliance with the statute in this respect was denied, and mandamus is now asked to compel its dismissal.

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Corliss & Andrus and *H. A. Chaney* for the motion.

THE COURT denied the motion, saying that they were of opinion that the court below had discretion to do what was done.

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CYRUS B. BARNES ET AL. v. THE MICHIGAN AIR LINE RAILWAY CO., ARTHUR BEEBE AND MARSHALL O. HADLEY.

Judgment—Construction—Presumption as to sufficiency of proof.

1. Pleas of abatement to the jurisdiction were filed by several defendants one of whom was a railway company. Both were tried, but in giving judgment the court, while reciting only that the railway company had pleaded in abatement ordered that the declaration of "said plaintiffs be quashed *and that the said defendants* go thereof without day; and that said defendants do recover of and from the plaintiffs *its costs and charges by it in its* defense in this behalf expended. *Held*, that the word "defendants" in this judgment referred only to the railway company.

2. Sufficient evidence to warrant the judgment is presumed to have been produced where the bill of exceptions does not purport to contain all that was given.

Error to Wayne. (Chambers, J.) April 15.—June 25.

CASE. Plaintiffs bring error. Affirmed.

Henry M. Cheever for appellants.

Maynard & Swan for appellees.

CHAMPLIN, J. Suit was commenced by declaration filed May 17, 1879, in the circuit court for the county of Wayne, for damages in a plea of trespass on the case. The declaration contains four counts. The first is in case, and the second, third and fourth in trespass vi et armis. The gravamen of the first count of the declaration is that defendant entered upon plaintiffs' premises, situated in Oakland county, Michigan, and obstructed the mill-race of their papermill, thereby

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interfering with the flow of water therein, and preventing the running of their paper-mill to its full capacity.

It was claimed by plaintiffs' counsel upon the argument, that the plaintiffs resided in the county of Wayne at the time suit was commenced. I have been unable to find anything in the record which shows that to be the fact.

No service was ever had upon the defendant Arthur Beebe. Defendant Hadley was personally served with declaration in Wayne county, August 18, 1879, and proof of such service was made and filed in the clerk's office the same day. The defendant Hadley filed a plea of the general issue, September 5, 1879. August 26, 1879, declaration was claimed to be served upon the defendant railway corporation in the county of Oakland, by delivering a copy to William Breese, a conductor of the defendant corporation.

On the 25th day of August, 1882, a copy of the declaration was served upon Joseph Hickson, who the plaintiffs claim was a general manager of defendant corporation, and that the service which was made on him in the city of Detroit, was a service on the defendant corporation. September 5, 1879, the Michigan Air Line Railway interposed a plea in abatement as to the jurisdiction of the person of defendant corporation claimed to have been acquired by the service on Breese, which was replied to by plaintiffs, tendering an issue of fact. No new issue was presented by the replication, and no rejoinder was filed. The railway corporation also pleaded in abatement as to the jurisdiction over the person of the defendant corporation by the service of declaration on Hickson. Plaintiffs replied, and there was a rejoinder and similiter. Both of these pleas were treated as fully at issue, and both were tried before the court without a jury, and evidence introduced on the trial was directed to the questions of fact set up in both pleas.

On the 20th of December, 1883, the court rendered the following judgment in said cause:

"The defendant, the Michigan Air Line Railway, having interposed a plea in abatement to the jurisdiction to the declaration in this cause, alleging that no proper service of the

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declaration filed in this cause had been made upon said defendant, the Michigan Air Line Railway and replication having been filed by said plaintiffs to said plea in abatement, to which replication said defendant, the Michigan Air Line Railway, having filed a rejoinder, and the issue of fact joined by said pleadings having been brought on for trial before this court without a jury, and the court having heard the allegations and proofs of the respective parties, and the arguments of counsel for the respective parties, and all and singular the premises being seen and by the court now here fully understood, and due deliberation being thereupon had, and the said court now here having found that the plea of said defendant, the Michigan Air Line Railway, by it pleaded in abatement, and the matters therein contained, in manner and form as the same are by it pleaded, is true in substance and in fact; therefore, it is considered and adjudged that the said declaration of the said plaintiffs be quashed; and that the said defendants go thereof without day; and that said defendants do recover of and from the plaintiffs its costs and charges by it in its defense in this behalf expended, to be taxed; and that the said defendants have execution thereof."

No exceptions were taken and no finding of facts filed. Eight errors are assigned upon the record. Six of them are based upon the assertion that in and by the above judgment the circuit court quashed the declaration not only as to the Michigan Air Line Railway, but as to defendant Hadley, who had appeared and plead the general issue, and as to defendant Beebe, who had not been served and who had not appeared. In this the counsel for the plaintiffs is mistaken. The judgment does not purport to extend beyond the matter in issue by the pleas in abatement, and does not purport to quash the declaration as to all of the defendants. In speaking of the Michigan Air Line Railway as defendant, it uses the plural noun and designates the railway as defendants, but the context shows plainly that only this defendant is referred to in the judgment. It adjudges that the "defendants" do recover "its" costs and charges by "it" expended.

The bill of exceptions does not purport to contain all the evidence. Sufficient evidence appears by the return to have been produced to support the judgment. Were it otherwise,

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on this record we should presume that sufficient evidence had been introduced to warrant the judgment rendered.

The other points commented upon by the counsel for plaintiffs cannot properly be raised upon this record, and the judgment is affirmed.

The other Justices concurred.

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OSCAR A. WILSON v. JOHN M. HOFFMAN.

Public lands—Map in evidence.

1. A map of a government subdivision is inadmissible in evidence without the surveyor's field-notes.
2. A certificate by the Commissioner of the State Land Office that "the annexed is a true and correct copy of" a specified governmental subdivision "as shown on government plat on file in this office," is insufficient to authorize the admission in evidence of a map of the subdivision referred to.
3. All subdivision lines of a section of land according to government survey must run straight from a point in one exterior line of the section to the corresponding point in the opposite boundary.
4. Ejectment for land described as being in the southeast quarter of a specified section cannot be maintained if the evidence shows that it lies west of a line drawn north and south through a quarter-post that stands midway of the south section line.

Error to St. Clair. (Stevens, J.) April 30.—June 25.

EJECTMENT. Defendant brings error. Reversed.

Avery Brothers for appellant.

Frank Whipple for appellee.

CHAMPLIN, J. Plaintiff brought ejectment to recover lands described in his declaration as follows: "A portion of the southeast fractional quarter of section twenty-eight, in town seven (7) north, of range seventeen (17) east, and bounded as follows: Commencing at a point where the south

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line of said section intersects the bank of Black river; thence on the south line of said section seventy-nine and one-half rods; thence north forty-seven degrees and twenty minutes west to the bank of Black river; thence south-westerly along the bank of Black river (up stream) to the place of beginning,—containing about seven acres of land."

The plaintiff claimed the premises in fee. There was evidence introduced upon the trial tending to prove that the original quarter-post, placed at the time the original government survey was made, was found upon the south line of the section, and that the premises in question lie wholly west of the quarter line if projected north and south through the section. Plaintiff based his claim of title through a patent from the United States to Hartford Tingley, and through mesne conveyances from him to plaintiff. The description of land contained in the patent is as follows: "The south-east fractional quarter of fractional section twenty-eight, in town seven north, of range seventeen east, containing 117 and 48-100 acres, according to the official plat of the survey of the said lands returned to the General Land-office by the Surveyor General."

The plaintiff offered in evidence a copy of a map of section 28, to which was annexed the following certificate under the seal of the Commissioner of the State Land-office, viz.:

"*State of Michigan, State Land-Office.*

OFFICIAL CERTIFICATE.

LANSING, April 19, 1882.

I, James M. Neasmith, Commissioner of the State Land-office, do hereby certify that the annexed is a true and correct copy of section 28, town 7 north, range 17 east, as shown on government plat on file in this office.

In witness whereof, I have hereunto subscribed my name, and have caused the seal of this office to be affixed.

Done at Lansing on the day and year above written.

JAMES M. NEASMITH,
Commissioner of State Land-Office.

[Seal.] By H. W. SLEEPER, Deputy Com'r."

This map was unaccompanied by any field-notes of the survey made by the United States surveyor of the section,

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and was received in evidence against the defendant's objection. This was error. The map without the field-notes was of no significance whatever. But aside from this consideration, the certificate was insufficient to admit it as evidence under the statute (How. Stat. § 5243), which provides that the Commissioner of the State Land-office shall, when required, on application of any person and payment of fees, make and deliver to the person applying a true copy of any field-notes, maps, records or papers in his office appertaining to land titles, or to the original surveys of any of the lands in this State, and any such copy, when duly certified to by such Commissioner under his seal of office, may be admitted in evidence, etc. The certificate fails to show that it is a true copy of any map in his office; and it entirely fails to give a true copy of the field-notes of the survey of the section, without which the map is entirely useless as showing either "title or boundary to any land that may come in question."

By Act of Congress approved February 11, 1805, entitled "An act concerning the mode of surveying the public lands of the United States," it was provided that "all the corners marked in the surveys returned by the Surveyor General, shall be established as the proper corners of sections or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on said surveys, shall be placed as nearly as possible equidistant from those two corners which stand on the same line. The boundary lines, actually run and marked in the surveys returned by the Surveyor General, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned by the Surveyor General aforesaid, shall be held and considered as the true length thereof. Each section or subdivision of section, the contents whereof shall have been returned by the Surveyor General, shall be held and considered as containing the exact quantity, expressed in such return, and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and con-

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sidered as containing the one-half, or the one-fourth part respectively, of the returned contents of the section of which they make part." All subdivisional lines of a section must be straight lines running from the proper corner in one exterior line to its corresponding corner in the opposite boundary of the section. It follows, therefore, that the patent and deed thereunder through which plaintiff claims, do not embrace within their description the lands in controversy, since no part thereof lies upon the southeast quarter of the section.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

CHARLES F. CONRAD v. THE SAGINAW MINING CO.

Mining lease—Trade fixtures—Right of removal.

As between landlord and tenant of a mining lease, engines and boilers erected by the tenant on brick and stone foundations, and bolted down solidly to the ground, and walled in with brick arches; and dwellings erected by the tenant for miners to live in, standing on posts or dry stone walls piled together,—where such machinery and buildings were intended to be merely accessory to the mining operations under the lease, and when there was no intention in affixing them to the realty to make them accessory to the soil, and where they can be removed without material disturbance to the land, are regarded as "trade fixtures," and may be removed at or before the termination of the lease."[1]

Appeal from Marquette. (Grant, J.) June 3–4.—June 25.

INJUNCTION bill. Complainant appeals. Affirmed.

F. O. Clark for complainant. Whatever is affixed to the realty is thereby made a part of it: *Graham v. C. N. J. R. R. Co.* 10 Am. Rep. 61; *Murray v. Moross* 27 Mich. 203; but this may be avoided, by an agreement in writing, for a

[1] The head-note in this case is by Mr. Justice Champlin.

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right of removal: *Crippen v. Morrison* 13 Mich. 24; otherwise, not: *O'Brien v. Kusterer* 27 Mich. 289; *Knowlton v. Johnson* 37 Mich. 47; *McAuliffe v. Mann* id. 539; but when the thing annexed or the mode of annexation is such that it cannot be removed without destroying it or removing the support of the realty it is an absolute fixture: 3 Wait's A. & D. 372; *Ford v. Cobb* 20 N. Y. 344; *Tifft v. Horton* 53 N. Y. 377: 13 Am. Rep. 537; *Coleman v. Stearns Mfg. Co.* 38 Mich. 30; *Morrison v. Berry* 42 Mich. 389; *Fryatt v. T. S. Co.* 5 Hill 116; *Ege v. Kible* 84 Penn. St. 333; *Green v. Phillips* 26 Gratt. 752; *Congregational S. of D. v. Fleming* 11 Iowa 533; *Palmer v. Forbes* 23 Ill. 301; *McLaughlin v. Johnson* 46 Ill. 163; *Heaton v. Findlay* 12 Penn. St. 304; *Whiting v. Brastow* 4 Pick. 311; where the question as to the removal of fixtures arises between landlord and tenant, it should always be ascertained whether they had executed the lease with covenants concerning fixtures: 3 Wait's A. & D., 372; this agreement must be in writing: 7 Wait's A. & D. 28, 29; *Hoysett v. Ellis* 17 Mich. 353, 375, 376.

Hayden & Young for appellee. The intention to annex or not determines whether an erection upon land becomes a fixture: *Stokoe v. Upton* 40 Mich. 582; *Wheeler v. Bedell* id. 696; *Robertson v. Corsett* 39 Mich. 779; *Seeger v. Pettit* 77 Penn. St. 440; *Hubbell v. East C. R. R.* (Mass.) 42 Am. Rep. 446; *Bewick v. Fletcher* 41 Mich. 626; *Hey v. Bruner* 61 Penn. St. 90; *Heffner v. Lewis* 73 Penn. St. 302.

CHAMPLIN, J. In the year 1871 David W. Allison and Edmund Heather were owners of certain wild land in section nineteen, township forty-seven north, range twenty-seven west, in Marquette county; and on the ninth day of September of that year they made and executed a lease to Nicholas Lonstorf, John B. Maas and John P. Mitchell, as follows:

"This indenture, made this 9th day of September in the year one thousand eight hundred and seventy-one between David W. Allison, of Saginaw city, Mich., and Edmund Heather, of Saginaw city, Mich., parties of the first part, and Nicholas Lonstorf, John B. Maas and John P. Mitchell, of Negaunee, Michigan, parties of the second part,

Witnesseth, that the said parties of the first part, for and in consideration of the rent, covenants and agreements here-

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inafter mentioned, reserved and contained on the part and behalf of the parties of the second part to be kept and performed, doth grant and convey unto the said parties of the second part and their assigns the right of entering in and upon the lands hereinafter described, for the purpose of searching for iron ore, and of conducting mining and quarrying operations to any extent they may deem advisable, for the term of fifteen years from the first day of October, in the year one thousand eight hundred and seventy-one. The said lands are situated in the county of Marquette and State of Michigan, and are known and described as follows: The west half (½) of the northeast quarter (¼), and the northwest quarter (¼) of the southeast quarter (¼) of the northeast quarter (¼) of the southwest quarter (¼), and the southeast quarter (¼) of northwest quarter (¼) of section nineteen (19), in township forty-seven (47) north, of range twenty-seven (27) west.

And the said parties of the second part hereby agree that they will pay or cause to be paid unto the said parties of the first part the sum of fifty (50) cents a ton for every ton of 2240 pounds of iron ore mined by them on said land, and by them shipped, sold or used. And it is agreed that settlement shall be made between the parties hereto on the first day of April and on the first day of October of each year of said term. And in such settlements the railroad receipts shall be used in ascertaining and determining the number of tons shipped, and payment shall be made at said times for all ore shipped, sold or used during the six months preceding the time of payment.

And it is further agreed that the said parties of the second part shall pay to the said parties of the first part the royalty or price of five thousand tons of ore mined on said land each and every year during the existence of this lease.

This lease may be terminated by said parties of the first part at any time within six months after any October first, after the month of October in the year one thousand eight hundred and seventy-three, in case the production of ore, during the twelve months ending at said date, and on which royalty is payable, shall not exceed five thousand tons(5000). Notice of such election shall be given to said parties of the second part, and the lease shall thereupon terminate on the first day of April next ensuing: Provided, however, that if the production of any year shall fall short of five thousand (5000) tons, said parties of the second part may save a forfeiture by paying royalty on that amount, and they shall be

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entitled to mine in succeeding years without paying royalty thereon as many tons as they shall have paid the royalty upon without having mined the same in former years. But this shall only be done in case they shall, during each succeeding year, also mine in addition (or pay a royalty upon) said minimum amount of five thousand tons.

It is hereby expressly agreed and understood that the said parties of the second part shall not be and are not liable to pay any royalty upon ore which shall not be actually mined and sold, shipped or used until the year commencing with October first, one thousand eight hundred and seventy-two. The provisions of this lease relating to payment of royalty upon five thousand tons each year, whether the same shall be mined or not, shall not be in force and shall not apply during the first year of said term, to-wit: from October 1st, 1871, to October 1st, 1872; but the parties of the second part shall pay a royalty upon all ore actually mined and shipped, sold or used during said first year. The parties of the first part agree to pay all taxes, general or special that may be assessed upon said land; and in case said first parties shall not pay the taxes when due, said parties of the second part may pay the same, and the sums so paid shall be charged to said parties of the first part, and may be deducted from any sums of money due from said second parties to said first parties. In case any other ore or mineral besides iron ore shall be discovered on said land, this lease shall apply to the same, except that no royalty shall be paid upon any such other ores or minerals unless the same shall be actually mined and shipped, used or sold, and the royalty to be paid on such other ore or mineral shall be in the same proportion, as to the value thereof, as by this lease is to be paid for iron ore.

The said parties of the first part hereby give the right to the said parties of the second part to use all the wood and timber standing on said lands as shall be necessary for mining purposes, and to erect such buildings and machinery upon said land, and to lay such railroad tracks and tramways, and make such other roads as may be necessary and convenient for mining purposes, and to use therefor any timber that may be standing upon said land.

And the said parties of the first part hereby covenant and agree that they will not suffer or do any act or thing which shall impair or annul the full effect of this lease; and they will warrant and defend said parties of the second part, their heirs and assigns, in full and peaceable possession of said demised premises against the lawful claims of all persons.

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In witness whereof, the said parties hereto have set their hands and seals the day and year first above written.

DAVID W. ALLISON. [Seal.]
NICHOLAS LONSTORF. [Seal.]
JOHN B. MAAS. [Seal.]
JOHN P. MITCHELL. [Seal.]
EDMUND HEATHER. [Seal.]

Signed, sealed and delivered in presence of
M. H. CROCKER,
TIMOTHY RYAN,
C. F. CONRAD,
as to signatures of Allison, Lonstorf, Maas and Mitchell.

Signed, sealed and delivered in presence of
I. MAMZER,
F. G. BROWN,
as to signature of Edmund Heather."

Under this lease Lonstorf, Maas and Mitchell went into possession and mined for iron ore thereon until December, 1872, during which time they erected a few buildings and some machinery for mining purposes. The land was mostly swamp and woods, and was of small value except for mining purposes, and at the time the lease was executed there were no buildings or improvements thereon. In April, 1872, the complainant, who previously had held an equitable interest, acquired by deed from the owners named, an undivided one-sixth interest in the land in question. In December, 1872, the defendant by purchase and assignment became possessed of all the rights of Lonstorf, Maas and Mitchell under the lease, and of all the buildings and machinery placed on the land by them up to the date of the assignment; and defendant thereafter operated the mine on the land up to October, 1882, when it ceased operations, claiming that the ore was practically exhausted in the mine and that it would not pay to keep the pumps going or the men at work. After defendant purchased, in 1872, it removed nearly all the machinery which had been used by the lessees, and replaced it with a heavier and more expensive kind, and at various times down to the suspension of active operations in 1882, it repeatedly removed some portions of the machinery, replac-

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ing it or not as its own convenience or necessity required, all of which in a general way was known to complainant who made no objection.

Various engine and pump-houses, as well as temporary residences for miners, were also erected upon the land by defendant from time to time as its convenience or the necessities of mining operations required; some of which—the engine and boiler houses—were very substantially built, the beds for engines being built of solid masonry; but all the erections for supporting and sheltering machinery were required by the nature of their use to be substantial in order to be useful.

The dwellings, to the number of 35 or 40 in all, erected at different times, were mostly of a very temporary kind, very cheaply built, a large proportion being built of logs at an expense of $75 to $150 each, and fourteen or fifteen were frame, costing $500 to $1000 each. Some were set on posts and some on dry stone walls piled together, and all now nearly worthless. All erections, whether of machinery or buildings, were made and paid for by defendant exclusively for "mining purposes," and were used for no other purpose, though capable of being used at other mines. The total cost of all machinery and buildings placed on the land by defendant at different times was from $50,000 to $60,000.

After the defendants had ceased to operate the mine under the claim stated, they notified complainant of their abandonment of mining operations and of their intention to remove their plant and property from the land leased, and offered to sell the same to the owners of the land if they desired to purchase. Complainant entered into negotiations for the purchase thereof, but without concluding the same, filed his bill of complaint, stating as follows:

"That under the provisions of said mining lease buildings have been erected upon said property in a very substantial manner, and have become fixtures to the freehold. There has also been erected solid brick and stone foundations upon which have been placed large engines, which have been bolted down solid to the ground. There has also been placed in

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brick arches large boilers connected with said engines, which have been walled in with brick in said arches built from the ground, and bolted down in the most substantial manner, which brick and stone foundations and arches and engines and boilers have become fixtures to the freehold and a part of the realty; that they were erected upon said property by agreement under said lease, but there was no agreement whatever in said lease permitting the removal of the same upon the surrender of the lease or the expiration of the same, or at any other time, so as to lessen the value of said property and to dismantle said mine and deprive it of its proper equipment of machinery and buildings so permanently affixed to the property;" and praying therein "that said defendant, its servants, agents and attorneys, may be restrained by the injunction of this court, and be decreed to forever desist from tearing up and removing said permanent fixtures, except upon replacing the same with as good at the time of the removal, and not to tear up or remove unless the successful working of said mine shall require it, and upon replacing the same with machinery of at least equal value."

The question involved is whether the machinery and buildings placed upon the land have been so affixed to the soil as to become part of the realty so as to preclude the defendant from removing them at or before the termination of the lease. It was conceded that the machinery in question was of the character denominated "trade fixtures," and that the intention with which they were annexed as well as the purposes for which they were used, would have a material bearing upon the case. Consequently a large part of the testimony was directed to the manner in which the property had been assessed for taxes; complainant claiming that the property in dispute had generally if not wholly been assessed as real estate, and under the provisions of the lease, been paid by the owners of the land. On the other hand the defendant's evidence tended to show that the property in question had always been assessed as personal property to the defendant, and it had paid the taxes levied thereon. The complainant testified to the custom in that vicinity of inserting clauses in mining leases giving tenants the right to remove fixtures, but the instances within his knowledge were all subsequent to the time when this lease was executed. The

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defendant showed by one witness that the custom testified to by complainant was not universal, and that during a residence of seventeen years in the county it had always been the custom, with every lease he ever had any knowledge of, for the lessees to have the privilege of removing the machinery, or any personal property erected thereon. The evidence of custom introduced by both parties is not sufficient to afford any assistance in the construction of the contract between them, or in determining the question before us, and must be laid entirely out of view.

The rights of the parties must be determined from the lease existing between them, in connection with the nature and use of the property, and the intention of the tenants in making the annexation. While there are certain general principles applicable to all cases arising between landlord and tenant as to what annexations are removable and what not, yet each case must in a great measure depend upon its own peculiar circumstances, and the intention of the party, and the time and manner of making the annexation, which will be of controlling influence in the correct disposition of the questions involved.

It will be noticed that the lease contains no clause reserving the right of re-entry in case of condition broken or failure to perform the covenants by the lessees, and that it entirely omits the clause usually contained in leases requiring the lessees at the expiration of their lease to yield up the premises in good repair. The lease contains no stipulation as to whether annexations made during the term shall remain or may be removed. The effect of the omissions is to leave the question of intention to be gathered from the stipulations the parties saw fit to embody in the contract between them, in connection with what they have done in the execution thereof. At the time the contract was entered into the mine was undeveloped, and there might or might not be ore found in sufficient quantities to warrant mining operations. The grant was to the parties of the second part and their assigns of the right of entering upon the lands for the purpose of searching for iron ore, and of conducting mining and quarry-

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ing operations to any extent they may deem advisable for the term of fifteen years; and the further right to use all the wood and timber standing on the lands as should be necessary for mining purposes, and to erect such buildings and machinery upon the land, and to lay such railroad tracks and tram-ways, and make such other roads as might be necessary and convenient for mining purposes, and to use therefor any timber that might be standing upon the land. This grant of the right to use the timber was a concession by the lessors to the lessees, and does not in any manner affect the matter in dispute.

From the testimony in the case we have no doubt that the machinery and buildings were intended to be accessory to the mining under the provisions of the lease, and that there was no intention in affixing them to the realty to make them accessory to the soil; and it appears that they can be removed without material disturbance to the land. They were such structures as the defendant had a right to erect on complainant's land, and therefore the defendant occupies a position materially different from what it would be in if it had wrongfully annexed such machinery and buildings to the soil of another. Furthermore it very plainly appears that the property in dispute was not annexed to the land for the better enjoyment of the land itself, but for the exclusive purpose of carrying on the mining operations; and the manner of the annexation also tends to show that it was designed for a temporary purpose in connection with the lease under which defendants were operating.

Under the facts disclosed by the record in this case, we think the circuit court was right in entering a decree dissolving the injunction and dismissing the complainant's bill, and the decree is

Affirmed with costs.

The other Justices concurred.

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FREDERICK BRAASTAD, JENS LEREGGEN, SVEND JOHNSON AND HAAGEN ASGAARD v. THE ALEXANDER H. DEY IRON MINING COMPANY.

Appeal after lapse of statutory period.

How. Stat. § 7005 permits appeals to be authorized after the statutory time for taking them has expired, if the party seeking to appeal was prevented from doing so by "circumstances not under his control." *Held*, that these include his serious illness or that of a member of his family,—and the rule applies where the party is the agent of a corporation.

Error to Marquette. (Grant, J.) June 5.—June 25.

ASSUMPSIT. Plaintiffs bring error. Affirmed.

G. W. Hayden for appellants. The statutory right to appeal is a special one, materially affecting legal rights: *McCaslin v. Camp* 26 Mich. 390; and the power to allow it after five days is not a discretionary one: *Draper v. Tooker* 16 Mich. 74.

A. B. Eldredge for appellee.

CHAMPLIN, J. Plaintiffs brought a suit before a justice of the peace against one John Sullivan, and at the same time garnished the defendant in this suit. The garnishee summons was served by reading and delivering a true copy thereof to James I. David, the agent of defendant corporation, and one of its principal officers, and the only one then in Marquette county. No one appearing before the justice to make disclosure in behalf of defendant corporation, he entered a judgment against it for $112.88, and $4.50 costs. This was in January, 1882. No appeal having been taken, the plaintiff waited until July, 1882, and then issued execution. Defendant then petitioned the circuit court for the county of Marquette for leave to appeal, for the reason that it had been prevented from taking the appeal from the judgment within the time allowed by law by circumstances not under its con-

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trol, as shown by the affidavits of William W. Wheaton and James I. David. The affidavit of David stated that he was served with the summons on January 10, 1882, returnable January 20th; that he informed the constable making the service that the company did not owe Sullivan, and asked the officer if it would be necessary under those circumstances for him to appear before the justice, and was informed by him that it would not; that he would inform the justice of the facts, and it would not be necessary for him or the company to take any steps with reference to the proceedings; that relying upon the statements of the officer he did not appear; that on the 21st of January his wife was taken dangerously sick,—so much so that for several days her life was despaired of; that from the 24th to the 29th of January he was in constant attendance upon his wife nursing and ministering to her, and as soon thereafter as she could be removed, on the first or second day of February, 1882, he took her to her home at Grosse Isle; that by reason of the sickness of his wife, he and the defendant were prevented from taking an appeal from the judgment; that shortly after his arrival at Grosse Isle he resigned his position in defendant company, and never informed them or any of its officers or agents, of the service upon him of the garnishee summons. Wheaton stated that the defendant had no knowledge of the judgment until execution was issued and an officer presented it and demanded payment; that David was the only agent or general officer of the corporation in Marquette county at the time of the service of the garnishee summons, and did not inform any of the other officers or agents of said company of the garnishee proceedings; that the Alexander H. Dey Iron Mining Company was not at the time of the service of said garnishee summons, nor has it since been, and is not indebted, nor had it then, or since, any property, money or effects in its hands or under its control belonging to said John Sullivan, nor was said Sullivan then, nor has he since been, in the employ of said company; that the general offices of said company are in Detroit; and that deponent has the sole charge

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of the ordinary business of the corporation in Marquette county.

Upon the petition and affidavits the circuit court of Marquette county issued an order requiring the plaintiffs in this suit to show cause why the court should not authorize an appeal from the judgment in the garnishee proceedings. The order was served upon the plaintiffs, and no cause to the contrary being shown, the court granted the application and allowed an appeal to be taken, which was done. After the appeal papers were filed in the circuit court, the defendants filed a plea of the general issue, and duly noticed the cause for trial. When the case was called for trial the plaintiffs appeared by attorney specially, and moved the court to dismiss the appeal taken in the cause and to hold the proceedings taken in that court for naught for want of jurisdiction in the court to entertain the same, owing to the insufficient showing for the appeal therein. This motion was denied, and the plaintiffs then declined to further prosecute their suit, and judgment of nonsuit was entered against them. Whereupon the plaintiffs have sued out a writ of error, and assign here the same cause of error taken in the trial court upon their motion to dismiss the appeal.

The statute provides that "appeals may be authorized by the circuit court or by the judge in chambers after the expiration of five days, when the party making the appeal has been prevented from taking the same by circumstances not under his control." How. Stat. § 7005.

The affidavits upon which the circuit court authorized the appeal made a case contemplated by the statute. They showed that the general offices of defendant were in Detroit; that David was the only agent or officer having charge of their business in Marquette county; and that the sickness of his wife was of such serious nature as to require his constant attention during the whole time allowed by law for taking an appeal in the ordinary way. Sickness of the party, or serious illness of a member of the family of the party, required by the law or practice to do certain acts within a specified time, is a sufficient excuse for non-performance of

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the required act, where the law or practice authorizes the relief of such party from the effect of his default upon showing sufficient excuse. Mr. David stands in the same relation to the proceedings as a natural person would if the proceedings were against him.

We think the showing was sufficient to give the court jurisdiction,

And the judgment must be affirmed.

The other Justices concurred.

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PORTER H. WHITFORD, EX'R v. LEVERETT CROOKS AND MAJOR B. WESTON.

Ejectment—Adverse possession—Estoppel by judgment.

1. Adverse possession is not broken by deeding the land away if the grantor continues in possession and takes back a mortgage for purchase money which he afterwards forecloses and under which he himself becomes foreclosure purchaser. And it is immaterial that the foreclosure proceedings are defective, if the possession is retained.

2. Ejectment was brought against the executors of an estate, and they prevailed. The executor of one of the heirs, to whom the rest had conveyed their interests, afterwards brought ejectment for the same land against a grantee of the plaintiff in the first action. *Held*, that the former judgment operated as an estoppel against such grantee. And if all the heirs united in defending the first suit the estoppel would not be affected by a question whether, as between one of the heirs and the ancestor, the title was in one or the other.

Error to Kalamazoo. (Mills, J.) June 5.—June 25.

EJECTMENT. Plaintiff brings error. Reversed.

Breese & Stearns for appellant. As to the point that the heirs were concluded by the former judgment, cited: *Cunningham v. Ashley* 45 Cal. 485; *Meeks v. Vassault* 3 Sawy. 206; 1 Greenl. Ev., 522, 523, 535, 536; *Russell v. Lasher* 4 Barb. 232; *Castle v. Noyes* 4 Ker. 329.

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Howard & Roos for appellees. All estoppels must be mutual: 1 Greenl. Ev. § 524; Bigelow on Estoppel, 46, 47; *McDonald v. Gregory* 41 Ia. 513; *Cobb v. Little* 2 Me. 261; a judgment is never an estoppel except as between the same parties or their privies: Freeman on Judgments, §§ 162 and 152; *Meyers v. Johnson County* 14 Ia. 48; *Stoddard v. Berton*, 41 Ia. 582; *Mayo v. Wood* 50 Cal. 171; *Aspden v. Nixon* 4 How. 467; *Smith v. Sherwood* 4 Conn. 276; *Bradford v. Bradford* 5 Conn. 127; *Fifield v. Edwards* 39 Mich. 264; *Tucker v. Rohrback* 13 Mich. 73.

Cooley, C. J. The plaintiff as executor of Emeline A. T. Whitford brought ejectment for land described as the south half of the southwest quarter of section five in township two south of range ten west, in the county of Kalamazoo.

It appeared in evidence that on October 31, 1853, Frederick Booker gave to Seth Wheelock a deed of the whole southwest quarter of said section five, and it is claimed that Wheelock took possession claiming title, and held and occupied the same until his death, which occurred June 11, 1868. Wheelock left surviving him his widow, Christiana and five children of whom Emeline A. T. Whitford was one. He also left a will, which was duly probated, of which the executors named were the widow and Porter H. Whitford. No disposition of this quarter section was made by the will, and the executors assumed the possession and management. March 29, 1869, John W. Kean commenced an action of ejectment against the executors, and the heirs all united in employing counsel and assuming the defence. The action involved the fee of the land; Kean claiming to be owner of the original title, and the executors and heirs of Wheelock claiming that the fee was in him at his death. The result of the suit was that Kean recovered judgment for the north half of the quarter section, and the defendants for the south half.

In the fall of 1878 the other heirs of Wheelock united in conveying their interests in the south half to Emeline A. T. Whitford.

Kean, after his ejectment suit was determined, gave a deed

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of the lot which he had failed to recover to one Aaron Benedict, and Benedict, it is claimed on the part of the defendant Crooks, deeded to him in December, 1873. The deed, however, was destroyed without being recorded, and another was obtained in June, 1874, which was put upon record. Crooks went into the possession of the land in the spring of 1874. One of the questions made in the case was, whether Crooks did not obtain possession by consent of Porter H. Whitford, one of the executors of Wheelock, and on an agreement that he would take no advantage of it. This will be referred to again. He refused to surrender possession on demand, and this suit was thereupon instituted.

Plaintiff in this suit claimed to have shown himself entitled to recover on four grounds:

1. Booker, when he conveyed to Seth Wheelock, was owner of tax titles for the land for the years 1846, 1849, 1850, 1851 and 1852. These titles were prima facie valid, and plaintiff insists they were not successfully impeached.

2. Seth Wheelock and parties claiming under him had been in possession of the land claiming title for twenty-one years, and thereby, as is claimed, a title by adverse possession had been perfected.

3. The deed from Kean to Benedict, and that from Benedict to Crooks, put Crooks in no better position than Kean himself stood in. But the recovery against Kean was an estoppel as against him, and is therefore an estoppel as against Crooks.

4. Crooks obtained possession under the executors of Wheelock, and on the agreement that he would take no advantage of it. And this estops him from asserting title in this suit.

Of these several claims, the first, second and third were ruled against by the trial judge, and the fourth was submitted to the jury upon conflicting evidence.

Whether any error was committed in ruling against the tax deeds, we do not deem it necessary to consider.

On the question of adverse possession, we think the judge erred in instructing the jury, as he did, that as matter of law

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the plaintiff did not acquire title to the land by adverse possession.

Seth Wheelock, as has been stated, went into possession of the land in 1853, and the evidence for the plaintiff is that he continued in possession until his death. It appears, however, that on February 13, 1864, he gave a deed of the land to John W. Wheelock, his son, taking back a mortgage for purchase money. Proceedings were subsequently had to foreclose this mortgage in chancery, a decree was obtained, and a sale made, at which the mortgagee became purchaser. The mortgagor was brought in by publication, and it is said the proceedings were fatally defective. But whether they were defective or not we think a question of no moment. If the evidence for the plaintiff is true, Seth Wheelock was in possession continuously, claiming either as owner or as mortgagee of the very title of which, till the mortgage was given, he had claimed to be owner, and the executors and heirs have continuously since his death claimed the title under him. From first to last, therefore, the possession and the claim have been under the possession taken by Seth Wheelock in 1853; and if the jury believed the evidence, nothing more was essential. *Scheetz v. Fitzwater* 5 Penn. St. 126; *Melvin v. Prop'rs &c.* 5 Met. 15; *Sawyer v. Kendall* 10 Cush. 241; *Williams v. Dongan* 20 Mo. 186; *St. Louis v. Gorman* 29 Mo. 593; *Shaw v. Nicholay* 30 Mo. 99; *Holton v. Whitney* 30 Vt. 405; *McNeely v. Langan* 22 Ohio St. 32; *Nelson v. Trigg* 4 Lea 705.

But the judge erred also in the instruction respecting the effect of the judgment in the suit brought by Kean. Kean asserted and endeavored to establish a title in fee, and the defendants, standing for and representing the heirs of Seth Wheelock, and having under the statute a right to the possession as representing the heirs, relied upon a title in fee in their testator. All parties interested in the estate of Seth Wheelock, including John W. Wheelock, united in defending the suit; and if the judgment had passed against the executors, the heirs would have been estopped from contesting the judgment afterwards. But if this is the case, they

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would on the other hand be entitled to the benefit of the estoppel as against Kean and all claiming in privity with him afterwards. And this estoppel would not be affected by the question whether, as matter of fact, the title as between Seth Wheelock and his son John was in the one or the other.

The judge erred also in his instructions respecting the fourth branch of the plaintiff's case, in assuming, as he did, that there was evidence from which the jury might draw the conclusion that the defendant took possession under the executors, and afterwards abandoned that possession, and took it again without their consent and adversely to the estate. We find no such evidence in the record. On the contrary, the defendant himself testified that he had continued in the occupancy of the land from the first. But this, as well as the claim under the tax titles, would seem to be immaterial in view of what is said on other branches of the case

A new trial must be ordered.

CAMPBELL and CHAMPLIN, JJ. concurred.

SHERWOOD, J. did not participate in the decision of this case.

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ORRIN N. HILTON, JUDGE OF PROBATE v. EMORY O. BRIGGS, ADMINISTRATOR ET AL.

Estates of decedents—administrator's inventory—Personal judgments without notice—Action on administrator's bond.

1. An administrator is not conclusively bound by the inventory he files of the decedent's estate, but may explain and correct it; he may show, *e.g.*, that property inventoried did not belong to decedent, but to a firm in which he was a member.

2. Personal judgments cannot rest on fictions of law nor be pronounced without an opportunity for hearing.

3. An administrator is not to be treated as at all times before the court and bound at his peril to know of proceedings affecting him.

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4. An order that an administrator shall pay the claims against the estate in a given time will not bind him if made as of course on a showing merely that all claims are in and that they amount to less than the estate as appraised: it will at most oblige him in a later proceeding to show cause for not doing so. And on his default an order permitting his bond to be prosecuted determines only the right to sue on it; it does not fix the administrator's liability.

5. One whose claim against an estate has been allowed but has not been paid within the time limited, makes a prima facie case in an action on the administrator's bond if he shows an inventory of assets exceeding the debts and an order for the payment of the debts; but defendants may rebut this by showing a deficiency of assets.

Error to Van Buren. (Mills, J.) June 10.—June 25.

DEBT. Defendants bring error. Reversed.

Annable & Fitch for appellants. An inventory is only prima facie proof as to what constitutes the property of the estate, and is always subject to disproof by either party: Schouler's Executors and Administrators, § 236: *Cameron v. Cameron* 15 Wis. 1; *Willoughby v. McCluer* 2 Wend. 608.

Benj. F. Heckert for appellee.

COOLEY, C. J. The defendant Briggs is administrator upon the estate of Charles G. Nash, late of the county of Kalamazoo, who died intestate in August, 1882. The appointment as administrator was made September 11, 1882. In the following month Briggs filed an inventory showing property to the amount of $527.48, and also, under the head of "Inventory of property belonging to E. O. Briggs and C. G. Nash, the undivided one-half of which belongs to C. G. Nash, deceased," further property was specified, the undivided one-half of which was appraised at $16,141.44. The judge of probate heard and passed upon the claims against the estate of Nash, and allowed several, aggregating about $2500, of which one of $599.92 was allowed to William J. Sellick. At the time of making these allowances the judge of probate entered an order that the administrator pay the same, with interest within ninety days from that date. After the expiration of the ninety days, the claims not being

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paid, the administrator on application of Sellick was cited to show cause why his official bond should not be sued; and on return of the citation an order giving leave to sue upon the bond was granted.

The present suit was then instituted in the name of the judge of probate for the use of Sellick, and judgment has been recovered for the amount of Sellick's claim. The questions that arise upon the record relate to the exclusion of evidence, and they may be briefly stated. The defendants claimed a right to show and offered to show that the only individual property belonging to Nash at the time of his decease was that which was inventoried and appraised at the sum of $527.48, and that the whole amount of that had been exhausted in allowances under the statute to the widow, and in the payment of funeral expenses and expenses of the last sickness; that all the remaining property in which Nash had an interest was property of the partnership of Briggs & Nash of which the administrator was the survivor; that said partnership at the time of the death of Nash was indebted to the amount of $20,000 and upwards; that the survivor has taken charge of the partnership property and business; but that at no time has it been possible to dispose of the property and save anything therefrom for the payment of the individual debts of Nash, after the satisfaction of partnership debts. The defendants also offered to show that the administrator had no notice of any application for the order directing the payment of claims within ninety days, and that he first learned of the same when he was cited to show cause why his bond should not be prosecuted. The circuit judge was of opinion that the order for the payment of claims—the same not having been appealed from—was conclusive upon the defendants in this suit, and he therefore directed a verdict for the plaintiff for the amount of Sellick's claim.

This ruling was based upon an assumption by the circuit judge, that, as the inventory showed ample means for the payment of all claims, the order for the payment of claims within the time specified was warranted by law, and if not entirely proper, was not void; and that if for any reason the

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administrator was unable to satisfy the claims from the assets of the estate he should have shown the fact when cited to show cause why his bond should not be prosecuted, and not having done so, he and his sureties are concluded by the order made on that citation.

We think the court has misapprehended the proceedings in these cases. There is and can be no claim that the administrator is absolutely bound by the inventory which he files in the case. The inventory is only a report of property which he is subsequently to account for; but there are many ways of accounting besides the production of money to the appraised value. The property may turn out to have belonged to some third party instead of to the decedent, or it may prove worthless, or be accidentally destroyed without the fault of the administrator; or it may on a proper sale produce far less than the appraised value. In this case the administrator offered to prove that it did not belong to the intestate but to a partnership of which the intestate was a member, and whose debts would exhaust it. If this was true, he made a mistake in having it inventoried and appraised as assets in his hands; but the mistake was one which was easily explained and might be readily corrected. And we do not doubt his right to explain and correct it.

The judge of probate appears to have assumed that the order for the payment of claims was to be entered as of course when the claims were all in and were found to be below the amount of the estate as appraised. If this was correct the order certainly could not bind the administrator; it could at most only oblige him to pay the debts within the time fixed or show reason in some future proceeding for a failure to do so. No person can have a personal obligation established against him in any judicial proceeding without an opportunity to be heard upon it. The suggestion made on the argument in this Court that the adminstrator is to be deemed at all times before the court and must at his peril take notice of the proceedings, is wholly inadmissible. No prudent person would accept the office of administrator under such a liability; and the assumption of presence, if to be

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indulged at all, would be a mere fiction of law. But there must be a better foundation than a fiction of law for a personal judgment.

If the order for the payment of claims does not bind the administrator, neither does the order giving leave to prosecute the bond. That order does not fix the liability of the administrator. If it did the subsequent suit would be worse than an idle ceremony; for it would uselessly impose upon parties and witnesses an expenditure of time and money, put the county to expense and impose labor upon the court, for the mere purpose of establishing a liability which was already fixed. The Legislature would never require this. If the liability were fixed, it would be a very simple matter to authorize process from the probate court for its enforcement.

But the order giving leave to prosecute the bond is an order which merely determines that it is proper, under the circumstances, that the claimant should be at liberty to show, if he can, in a court of law, that the administrator and his sureties are under legal obligation to satisfy his claim or some part of it. It is in that court that the question of liability is to be tried, and in that court the obligors in the bond are at liberty to meet any case which may be prima facie made out against them.

In this case the claimant showed that his claim was allowed, and to that extent his showing was conclusive. But the showing of the inventory and the order for the payment of debts at the most only made a prima facie case, and the defendants were at liberty to rebut this by any showing which would establish a deficiency of assets. The order for leave to prosecute the bond merely determined the right to bring the suit. It determined nothing more.

A new trial must be ordered.

The other Justices concurred.

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ALBERT HALL, DRAIN COMMISSIONER v. EDWARD E. PALMER ET AL.

Statutory actions—Cost of drain proceedings.

1. One who relies on a statutory right of action must come within its terms by showing that the facts exist on which the liability arises.

2. The cost of drain proceedings can be recovered by the drain commissioner in assumpsit against the petitioners for the drain, if special commissioners shall find that there was no sufficient ground for the petition. How. Stat. § 1697. *Held*, that where the petition was approved by the special commissioners, but the drain commissioner had surveyed a ditch differing materially from that asked for, there was no ground for the action.

Error to Lapeer. (Stickney, J.) June 11.—June 25.

ASSUMPSIT. Defendants bring error. Reversed.

Moore & Bentley for appellants.

Geer & Williams for appellee.

CHAMPLIN, J. The plaintiff was drain commissioner of the township of Imlay, in Lapeer county. The defendants are residents of Imlay. Some time in May, 1882, the defendants applied in writing to the plaintiff as drain commissioner, to construct a water-course or open ditch in the township of Imlay, as follows:

"Commencing at the crossing of Belle river by the Chicago & Grand Trunk Railway; thence southeasterly along the course of said Belle river to the crossing of said river by the Ross road bridge, on section 33."

On receiving this application the plaintiff proceeded to examine personally the line of the proposed drain, and decided that it was necessary for the good of the public health that the application should be granted. He afterwards caused a survey to be made, and established a ditch which in some places was from 40 to 70 rods from the course

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of Belle river, and in one place providing for a cut-off 149 rods long and 16 feet wide. He was unable to get releases of the right of way from all the parties through whose land the drain was laid, and thereupon applied to the judge of probate for the appointment of three special commissioners, who reported that they did declare it to be their opinion that it was necessary and practicable and for the good of the public health, that the drain should be constructed as prayed for in the application therefor, and they inserted the application made by the defendants verbatim. The petition for the appointment of these commissioners described the drain as surveyed and laid by the commissioner, which, as before stated, differed in some parts materially from that applied for, and respecting which they made no finding or report. Thereupon the plaintiff, on the 13th day of November, 1882, made the following order, viz.:

"Whereas, heretofore, to-wit, on the 19th day of May, A. D. 1882, application was made to me, the undersigned, township drain commissioner in and for the township of Imlay, in the county of Lapeer, to construct a drain in said township as hereinafter set forth: Whereupon, three special commissioners were appointed, by and in the manner above specified, and, upon the finding of said special commissioners, it was declared and determined that there was not sufficient cause for making such application, and that such drain was not necessary and practicable, and that the said applicants, to-wit, Byron Deneen, George Leniker, George R. Manwaring, F. M. Dodge, C. A. Mosher, N. B. Eldredge, E. E. Palmer, Jacob Cohn, R. Murphy, Charles Palmer and Stephen R. Dodge, are jointly and severally required to pay to me the amounts of costs and expenses incurred in these proceedings, amounting to the sum of one hundred and eight dollars and ninety-one cents.

In witness whereof, I have hereunto set my hand and seal this 13th day of November, A. D. 1882.

ABNER HALL,
Township Drain Commissioner for the Township of Imlay."

The plaintiff claims that the action of the commissioners in reporting in favor of the ditch applied for by the defendants, and not reporting for or against that laid by the com-

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missioner, was in effect a denial of the application, and a sufficient basis for a determination by him that there was not sufficient cause for making such application, and that the applicants are jointly and severally liable to him for all the costs and expenses incurred in the proceedings, under and by virtue of How. Stat. § 1697, which reads as follows:

"If, on such examination and survey, or upon the finding of special commissioner, as hereinafter provided, it shall appear that there was not sufficient cause for making such application the commissioner shall so determine, and the applicants shall be jointly and severally liable to the commissioner for the amount of all costs and expenses incurred in the proceedings, to be recovered at the suit of such commissioner in an action of assumpsit or on the case, before any justice of the peace of the proper county; but if the commissioner shall determine that such drain is necessary and practicable, he shall establish the same as hereinafter provided."

Consequently he brought this action to recover the same.

There are several errors fatal to a recovery; but only one will be discussed as it alone is sufficient to dispose of the case upon the merits. The right of action relied upon by plaintiff is purely statutory, and he must bring himself within its terms by showing the existence of the facts upon which such liability is predicated. The application is the foundation of the whole proceeding in cases of this kind. It is this which confers jurisdiction upon the commissioner, and no substantial departure from the improvement prayed for can be made without losing jurisdiction. The improvement sought to be made by the commissioner was materially different from that asked for by defendants. If it had been determined that there was not sufficient cause for making such application as was made by defendants, they would have been liable for the costs and expense of the proceedings. But this is not the case. On the contrary the commissioner testifies that he personally examined the line of the proposed drain, and decided that it was necessary and for the public health that the application should be granted. The special commissioners found the same thing. There

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was therefore no basis for the order of November 13, and it was not warranted by the facts. No statutory liability has been incurred by defendants to pay the plaintiff the costs and expenses of these proceedings.

The judgment must be reversed, and a judgment entered here in favor of defendants against the plaintiff, for costs of all the courts.

The other Justices concurred.

GOTTLIEBA PZOLLA v. MICHIGAN CENTRAL R. R. Co.

Railway injury to person crossing track.

The wife of a man who was employed by a railroad company in taking her husband his dinner, had occasion to cross half a dozen busy tracks that lay side by side. In stepping out from behind some cars that stood on one of the tracks she was struck and injured by an engine on the next track, that was backing down in front of her and across her path. *Held*, that whether or not the railway company was negligent in running the engine at a prohibited rate of speed or in failing to ring its bell, the woman was not exercising ordinary care and could not recover for the injury to which she had contributed by her own negligence.

Error to the Superior Court of Detroit. (Chipman, J.) June 11.—June 25.

CASE. Plaintiff brings error. Affirmed.

Babcock & Thompson for appellant. The fact that one in attempting to cross a railroad does not, at the instant of stepping on it, look to ascertain if a train is approaching, is not conclusive evidence of a due want of care on his part, and more particularly if by the omission of customary signals plaintiff has been lulled into a feeling of security: *Plummer v. Eastern R. R. Co.* 73 Me. 591; *Hart v. Erie Ry. Co.* 3 Alb. L. J. 312; *Detroit & Milwaukee R. R. Co. v. Van Steinburg* 17 Mich. 123; *Kellogg v. R. R. Co.* 79 N. Y. 72; *Chaffee v. B. & L. R. R.* 104 Mass. 108; *Kennayde v. Pacific R. R.* 45 Mo. 255.

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Henry Russel for appellee, cited the following cases of contributory negligence: *Cauley v. P. C. & St. L. R. R.* 2 Am. & Eng. R. R. Cas. 4; *N. C. Ry. v. State* 6 id. 66; 54 Md. 113; *Col. Central R. R. v. Holmes* 8 id. 410: 5 Col. 197; *I. & G. N. Ry. Co. v. Jordan* (Texas) 10 id. 301; *Terre Haute & I. R. R. v. Graham* (Ind.) 12 id. 77; *B. & O. R. R. v. Depew* (Ohio) id. 64; *Yarnall v. St. Louis &c. R. R.* 75 Mo. 575: 10 Am. & Eng, R. R. Cas. 726; *McClaren v. Ind. & V. Ry.* (Ind.) 8 id. 217.

CHAMPLIN, J. This action was brought to recover damages for personal injuries received by plaintiff in attempting to cross defendant's railroad, and while so doing being run against by defendant's engine. It appears from the plaintiff's testimony that on the 18th day of July, 1883, she was injured by defendant's engine while crossing the company's track from the slaughter-house of Hammond & Standish, near the Twentieth-street crossing. At this point defendant's tracks run nearly east and west. There were six tracks which passed the point where plaintiff was injured, and a track leading to an ice-house 225 feet west of Twentieth street. The other six tracks are thus described: Commencing on the south the first track is called No. 1; the next are called the south and north main tracks; north of these the tracks are numbered 1, 2, and 3. The main tracks were used for all passenger trains and freight business, and for the general working tracks to get in and out of the yard. At that time defendants ran in and out over the main tracks about sixty passenger trains daily, and an equal number of passenger trains for light business, and also about eighteen switch-engines constantly running in and out. The yard was being used at that time by the Michigan Central main line; the Detroit, Lansing & Northern; the Grand Trunk; the Flint & Pere Marquette; the Detroit & Bay City; and the Canada Southern Railroads. At the Twentieth street crossing defendant had a flagman, and sign-boards on the corner, containing the words: "No thoroughfare. The public are warned against walking on these tracks." Engines going east into the city for a train would run backward, and switch-engines running one way would go backward, and the other way forward.

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The plaintiff was sworn as a witness in her own behalf, and testified that her husband was employed by the defendant on the north side of the tracks described above, and that she had been accustomed to carrying her husband's dinner to him, and in doing so she went up by the slaughter-house, west, and then went across the tracks to the company's yards north of the railroad, between Twentieth and Foundry streets; that her husband had been employed by defendant for three months; that she always went the same way; that she was standing upon the south side of the track upon which the engine was running when she was struck; that there were cars ahead of her, and before she stepped out from behind these cars she stopped and looked and listened, but did not see or hear anything; that she could not see up the track far on account of the cars. On cross-examination she testified that she did not know but she guessed she saw a sign painted in English on the corner of Twentieth street, forbidding people to go on the tracks; that she knew that alongside of the slaughter-house there were railroad tracks and cars and engines running nearly all the time; that she always stood there and looked around so as not to be struck by them; and when she walked on the track she was always afraid; that she was not walking on the tracks but between the tracks when she was struck; that she did not know how far she had walked when she was struck. On re-direct examination she testified as follows:

"When I went west up the tracks from Hammond & Standish's towards the ice-house I walked on the second track, and I was struck after I had turned to go across the tracks where my husband was working."

On re-cross examination plaintiff testified:

Question. In the place where you were hit by the engine, could not you see down the track a quarter of a mile, clear free?

Answer. I could not see on account of the cars which stood there.

Q. After you came out from behind the cars, could you not see a quarter of a mile, or were you struck so soon that you could not see at all?

A. I got struck right away.

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Q. Before you could look at all?

A. When I came from in rear of the cars I got struck.

Q. After you stepped from behind the cars where you could not see out on the other track, you never stopped to look at all, but walked right along the track?

A. Yes; I got struck right away.

Q. You were not between the rails at the time you were struck, but was close on the south side?

A. I was on the side. I was struck on the right side. Before I turned to go across the tracks I looked to see whether I could see anything or hear the bell."

A witness for plaintiff, by the name of Thomas Wiemer, was standing on the top of a car next to the ice-house; he saw an engine running down on the south main track, and he estimated the speed at which it was going at about twelve or fourteen miles an hour, and stated there was no bell ringing, to his knowledge. He did not see the accident and does not know that the engine he saw was the one that struck the woman, and at the time it passed he did not hear any exclamation or see any commotion about the place; that about an hour after, he saw the plaintiff sitting in the watchman's shanty at the corner of Twentieth street, and saw that she was badly injured; that there was a switch-engine and cars on track No. 1, between him and the south main track, on which that engine was running

Walter Smith was working with the last witness on the refrigerator car at the ice-house, and saw the engine coming down the south main track, and in his judgment it was coming fourteen miles an hour. He did not hear the bell ring, and thinks he would have heard it had it been ringing. He saw the woman after she was hurt; did not see the accident, but heard a woman had been struck.

It is conceded that plaintiff was seriously and permanently injured. The plaintiff's testimony also showed that, on account of a curve in the track to the west of where the accident happened, a person emerging from behind cars on track No. 1 on the south side of the main track, could see but a short distance in that direction.

The foregoing comprises substantially all the testimony relating to the manner in which the accident happened. It

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appears very plain that the plaintiff, by her own negligence, contributed to the injury. She voluntarily went into a place of great danger, of which she was fully aware. She says she was hit upon the right shoulder as she attempted to cross from the south to the north side of the tracks by an engine backing from the west, along the south main track. If this was so she must have been facing the engine at the time, and must have seen it approaching unless she was guilty of the utmost heedlessness. Yet she says she did not see the engine coming. It appears from her statement that she stepped from behind the car on track No. 1 directly in front of the passing engine, or so near to it as to be struck by it. It does not help the plaintiff's case to show that she was rightfully on the defendant's grounds, or that defendant was guilty of negligence in not ringing the engine bell, or in running at a rate of speed prohibited by ordinance, if the plaintiff's negligence contributed to the injury. It was incumbent upon the plaintiff not only to show that the defendant was negligent but that she was in the exercise of ordinary care. The testimony is conclusive against the plaintiff that she was not in the exercise of ordinary care.

It follows that the judge of the Superior Court committed no error in directing a verdict for defendant,

And the judgment is affirmed.

The other Justices concurred.

Henry Stanley v. Harvey D. Nye.

Consideration—Sale or Security—Set-off.

1. A transfer of land for less than its value is a legal consideration for an agreement by the transferee that he will settle certain claims arising out of mutual transactions and standing against the person making the transfer. And it is immaterial whether the claims so disposed of were binding obligations or not.

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2. A transfer of land cannot be treated in an appellate court as by way of security if the jury below has found it to be a sale.

3. Where part of the consideration for a transfer of land was the settlement of claims outstanding against the grantor, the transferee could not, in an action against him for the money consideration, set-off the amount of such claims settled by him before the transfer.

Error to Genesee. (Newton J.) June 12.—June 25.

ASSUMPSIT. Defendant brings error. Affirmed.

George H. & Charles A. Durand and *Isaac Marston* for appellant.

Howard & Thayer and *Long & Gold* for appellee.

CAMPBELL, J. This suit, which was before us on a different record and reported in 51 Mich. 232, is an action to recover $2000 which plaintiff testified defendant agreed to pay him in consideration of the conveyance of certain lands in Flint of greater value, which plaintiff claims were turned out to induce defendant to relieve him from any further liability and settle up some demands which defendant wished to have paid up, and which plaintiff was unwilling to pay. Upon the former record as the testimony was represented in the bill of exceptions, we were of opinion that the plaintiff's showing made out no such transaction. On the new trial he explained his former testimony and made out a full showing, if believed, which would justify a verdict in his favor. The jury acted upon his testimony and gave him the amount claimed, less a set-off of an amount due defendant on a different transaction. Defendant brings error.

The principal argument was aimed at showing that plaintiff's testimony showed the dealing to be a security and not a sale. This ground is not tenable. The testimony was properly submitted to the jury on the conflicting evidence, and there was enough to authorize them in their finding.

The parties had for some time before this arrangement been dealing somewhat heavily in Chicago speculative transactions involving options and margins, and had balances

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claimed against them on these dealings, and bank paper held in Flint which had grown out of them. These bank and other balances are claimed to have amounted to not far from $9000. According to plaintiff's statement, his property, outside of his homestead, had been reduced so that the land in question made up all or nearly all that he had left. Defendant was anxious to have this indebtedness settled up. Plaintiff was unwilling to pay it, and claimed that much if not all of it arose out of illegal transactions which he was not disposed to settle up. Finally he claims that he came to an agreement with defendant that he would sell to him this land, which he reckoned as worth about $4000, in consideration that defendant should settle up these claims and pay him back $2000. It was further agreed, and of this there is testimony from the draughtsman as well as from plaintiff, that he should have an option to repurchase the land on refunding $4000 with interest. Defendant claims this was a mere security. It is admitted on the record that plaintiff was not to pay this $4000 or any part of it, unless he chose to do so. The draughtsman also testifies to the fact set up by plaintiff, that defendant was to pay plaintiff for some purpose $2000. He also testifies, as plaintiff does, that originally the parties differed as to whether the sum to be paid should be $2000 or $2500, and that finally the sum was fixed at $2000. It further appeared that defendant was at once put in possession, and has ever since received rent at $432 a year, and that he has mortgaged the land for $2000 to a third party.

It is a doctrine well settled that such a transfer of land is a legal consideration for such an agreement as plaintiff relies on. And it could make no difference, as the court correctly instructed the jury, whether the matters so adjusted were binding or not binding obligations. If defendant was willing, in consideration of what plaintiff testifies was reckoned as worth $2000, to see that he should be relieved from them, the bargain was one which could lawfully be made, and the jury have found it was made.

It was urged further that defendant was entitled to set off

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against this claim of $2000 so much of these claims as he had paid, beyond one-half, after deducting the value of the land. But this cannot be so. If the contract was made as plaintiff asserted, then it put an end to any responsibility of plaintiff upon those claims so far as defendant was concerned, and bound defendant to settle them at his own expense. If plaintiff made no such bargain with defendant, then he made out no case at all; and the jury have found he did. There was a set-off proven and allowed by the jury, which was distinct from the other, and is not complained of.

Upon the whole record we find nothing to indicate any erroneous rulings. The judgment must be affirmed.

SHERWOOD and CHAMPLIN, J J. concurred with CAMPBELL J

COOLEY, C. J. dissenting. When this case was here before it was held that upon the plaintiff's own showing, the land for the price of which he had sued was deeded by him to the defendant by way of security, and that consequently his action, which assumed that it had been sold to the defendant, had no basis. The case went back for a new trial, and the plaintiff, being then apprised of the defect in his case, has changed his evidence, and by testifying in flat contradiction of himself, has succeeded in obtaining a verdict. So plain a case of bending the facts to the exigencies of the controversy is probably seldom seen.

But I think that his evidence, taken in connection with that of the notary, still shows the case to have been one of security, and that upon all the facts shown by himself there is no room for any other conclusion. I think the plaintiff was entitled to an instruction to that effect. I also think that the legality or illegality of the transactions which led to the giving of the deed was not immaterial as the judge in his instructions assumed it was. If the transactions were legal, the parties were jointly liable for considerable debts, which the defendant undertook to pay off for both; and the improbability of his having made such an arrangement as the defendant undertook to set up would have been vastly greater than if no such indebtedness existed. It would not have been surprising if in the minds of the jury the whole

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case would have turned upon the view they took of the legality of those previous transactions. The judge should have given them specific instructions on the subject.

I think the case should go back for a new trial.

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BENJAMIN VERNOR v. AMANDA M. COVILLE, SAMUEL H. SMITHERS AND JOHN WEBSTER.

Wills—Power of individual executor to sell realty.

1. The clause in a will which empowers the executors "to sell and convey any real estate" will be a sufficient warrant for a sale made by one of two executors if the other has renounced the trust, the "authorized" executors having the same authority as all to perform every act allowed by the will: How. Stat. § 5844.

2. The language in a will which gives an executor his authority is presumed to have been made with reference to the statutory provisions relating thereto, and must be construed as if it embraced those provisions.

Error to the Superior Court of Detroit. (Chipman J.) June 12.—June 25.

ASSUMPSIT. Plaintiff brings error. Reversed.

Charles M. Swift for appellant. The question is, where a general power to sell lands is given to executors and only one qualifies, can he make a valid conveyance under How. Stat. § 5844, which is:

"When all the executors appointed in any will shall not be authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act, and discharge every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose as if all were authorized, and should act together; and administrators with the will annexed, shall have the same authority to perform every act, and discharge every trust, as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose."

Judicial construction is not called for, because the language is entirely unambiguous. The executor who is authorized is the executor who qualifies "according to the provisions of this chapter," *i. e.*, gives the required bond and receives

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letters testamentary. Being so authorized, he is given the same authority to perform every act and discharge every trust required and allowed by the will which he and his co-executor would have had if both had qualified.

The words of the statute and the subject matter directly oppose defendant's contention that the statute applies only to such acts of executors as are purely administrative. The intent of the Legislature is unmistakable. The authorized executors are given power to do certain acts and discharge certain trusts. These are not the acts and trusts incident to the administration of the estate, or such acts and trusts with the addition of some others mentioned in the will, but "every act and every trust required and allowed by the will." But if the Legislature had in mind to give to the authorized executors administrative powers simply, the enactment in question is entirely unnecessary, for there are other sections amply providing that much.

Section 5837 provides:

"No person named as executor in any will, who shall refuse to accept the trust, or shall neglect to give bond as prescribed in this chapter, for twenty days after the probate of such will, shall intermeddle or act as executor."

Section 5838 follows:

"If a person, named executor in any will, shall refuse to accept the trust, or shall, for the space of twenty days after the probate of the same, neglect to give bond, as required by law, the probate court may grant letters testamentary to the other executors, if there be any who are capable and willing to accept the trust, and if there be no such other executor, who will give bond, the court may commit administration of the estate, with the will annexed, to such person as would have been entitled to the same, if the testator had died intestate."

Thus, if after twenty days, an executor refuses or neglects to qualify, his authority may become extinguished. Other sections of the same chapter cover instances where the authority of an executor may be terminated by death or removal.

Section 5843 provides:

"When an executor shall die or be removed, or his authority shall be extinguished, the remaining executor, if there be any, may execute the trust; and if there shall be no other executor, administration, with the will annexed, may be granted of the estate not already administered."

And by section 5840:

Administrators with the will annexed "shall proceed in all things to execute the trust in the same manner as an executor would be required to do."

Now, if only duties connected with the administration were intended by the Legislature to survive to the qualifying executor, that end is fully secured by the sections above

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quoted. Again, there is authority for the proposition that independent of any statutory provisions, administrative duties or powers would descend upon those executors who qualify, and those only: *Houell v. Barnes* Cro. Car. 382; *Marr v. Peay* 2 Murph. 84; *Treadwell v. Cordis* 5 Gray 341, 360; *Chandler v. Rider* 102 Mass. 268.

No statute similar to this has ever been construed so far as has been discovered, except in *Re Besley's Estate* 18 Wis. 451.

Where the management and sale of property for the care of an insane sister, was confided to the testator's brother as sole executor by devise to him alone, and upon his death, an administrator, with the will annexed, was held not entitled to discharge the trust. The authorities cited are New York cases, dependent on the statute for which the Legislature of Michigan substituted the present enactment. The New York statute, which is in the words of section 9, chap. 1, title 4, of the Mich. Revised Statutes, 1838, reads as follows:

"In all cases where letters of administration with the will annexed, shall be granted, the will of the deceased shall be observed and performed; and administrators with the will annexed shall have the same rights and powers and be subject to the same duties, as if they had been appointed the executors of such will."

The leading case cited in *Re Besley's Estate* and relied on in nearly all of the other cases on the subject, is *Conklin v. Edgerton's Admrs* 21 Wend. 430; 25 Wend. 224. By reason of peculiarities in the New York revision, this statute was held not applicable to real estate, and was construed to confer upon administrators with the will annexed only such powers as executors would have at common law, or such as is given them under the provisions of the chapter in which the section quoted occurs; and the bulk of the opinion in the lower court consists in pointing out that the power of sale is not such a power as pertains to the office of executor. On review Chancellor Walworth decided on different ground.

The contrast between the New York and Michigan enactments is apparent at a glance, and it would not seem entirely unreasonable to adopt the construction claimed by Justice Cowen, since all the cases seem unwilling to extend the powers of administrators with the will annexed. By the New York provision, such administrators were to have the same rights and powers and be subject to the same duties as if they had been appointed executors. This is not entirely free from ambiguity. This is an opportunity to claim, with some show of reason, that the rights and powers referred to

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include simply such as they would receive from the probate court. But in the Michigan statute which has been substituted for this enactment, no such doubt can arise. For here the powers and duties cover "every act and every trust required and allowed by the will."

Some Pennsylvania decisions may be relied upon by the defense. But they are subject to the same criticism.

The statute there reads:

"All and singular the provision of this act relative to the powers, duties and liabilities of executors, are hereby extended to administrators with the will annexed," which plainly restricts the powers to such as occur in administration. *Ross v. Barclay* 18 Penn. St. 179; *Waters v. Margerum* 60 Penn. St. 39.

It is worthy of observation that while courts seem desirous of restricting the authority of administrators with the will annexed, the beneficent character of enactments similar to the statute of 21 Hen. VIII. c. 4, is recognized and a broad rule of construction adopted. To illustrate: The New York statute, which is a substantial reproduction of the statute of 21 Hen. VIII. c. 4, is as follows:

"Where any real estate or any interest therein is given or devised by any will legally executed, to the executors therein named, or any of them, to be sold by them, or any of them, or when such estate is ordered by any last will to be sold by executors, and any such executor shall neglect or refuse to take upon him the execution of such will, then all sales made by the executor or executors who shall take upon them the execution of such will shall be equally valid as if the other executors had joined in such sale:" *Taylor v. Morris* 1 N. Y. 349.

This provision occurs in the chapter relating to sales by executors or administrators under orders of the probate court, which are always for administrative purposes, and not otherwise. Might not the court, then, if disposed to be technical, have limited the section to such sales only as occur in the course of administration? But as before observed, recognizing the embarrassments which these statutes seek to remedy, all the courts have been very liberal in construing such provisions: *Evans v. Chew* 71 Penn. St. 47; *Lantz v. Boyer* 81 id. 325; *Nelson v. Carrington* 4 Munf. 333; *McDowell v. Gray* 29 Penn. St. 211; *Pahlman v. Smith* 23 Ill. 448; *Taylor v. Galloway* 1 Ohio 232; *Zebach v. Smith* 3 Binn. 69; *Taylor v. Morris* 1 N. Y. 346; *Clinefelter v. Ayers* 16 Ill. 329; *Chanet v. Villeponteaux* 3 McC. 29; *Wood v. Sparks* 1 Dev. & Bat. 389; *Brown v. Armistead* 6 Rand. 593; *Coleman v. McKinney* 3 J. J. Marsh. 246; *Ross v. Clore* 3 Dana 189; *Wells v. Lewis* 4 Met. (Ky.) 269; *Britton v. Lewis* 8 Rich. Eq. 271; *DeSaussure v. Lyons* 9 S. C. 492; *Jennings v. Teague* 14 S. C. 229.

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Alfred E. Hawes for appellees. A contract made by an executor after the period has expired within which he is authorized to administer on the estate (How. Stat. §§ 5918–21; *Hoffman v. Beard* 32 Mich. 222) cannot be regarded as an act of administration if there is nothing to show that the time was extended during which he could make it: *Biddle v. Wendell* 37 Mich. 452; *Larzelere v. Starkweather* 38 Mich. 100; *Church v. Holcomb* 45 Mich. 37; *Daly's Appeal* 47 Mich. 443; ordinarily the executor's custody of the estate is supposed to cease with the lapse of the statutory period of administration. Then the estate, real and personal, is supposed to have been relieved of all charges: *Hoffman v. Beard* 32 Mich. 222–3; and under How. Stat. § 5964, the right to a partition and distribution among the beneficiaries is complete. Then in the language of *Calkins v. Smith's Estate* 41 Mich. 412: "At that stage of his proceedings the executor's duties may be said to be closed, nothing remaining to be done by him as such, except the rendering and adjustment of his own account. What further he has to do in respect to the estate was to be done not as executor but as donee of a power in trust." See also *Battelle v. Parks* 2 Mich. 531; *Re Besley's Estate* 18 Wis. 451. The Statute of Limitations affecting rights of action upon the executor's bond begin to run at the expiration of said four years and six months at the latest: *Biddle v. Wendell* 37 Mich. 454; so acts and trusts, directed or reposed by the will in the persons named and acting as executors, have been held by this court to vest in them as donees of a power in trust when they are to be performed after the limit allowed for administration: *Calkins v. Smith's Estate* 41 Mich. 412; *Battelle v. Parks* 2 Mich. 531; during administration executors are mere officers of the law: *Gilkey v. Hamilton* 22 Mich. 286; after administration they are the attorneys of the testatrix, and the will is their power of attorney: *Battelle v. Parks* 2 Mich. 531; *Calkins v. Smith's Estate* 41 Mich. 412; what renders it more apparent that the section in question does not reach the contract in question, is the provision that an administrator with the will annexed, shall have the same authority as the authorized executor. And we are unable to find it has ever been held that such an administrator could make a sale of real estate after administration, although the same might have been done by the donee of a power in trust named in the will the administrator had been appointed to execute: *Ross v. Barclay* 18 Penn. St. 179; *Waters v. Margerum* 60 Penn. St. 39; in view of

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the fact that the statute had barred the right to make the contract as an act of administration; that it was unauthorized by the first and fourth clauses of the will; that it was authorized only as an act of adminstration; that the executor's bond can have no separate and independent force to affect the rights of the donees of a power in trust to authorize one and disempower the other, it belonging to the purely administrative proceedings; that the contract in question was executed by one executor alone when the other (under How. Stat. § 5628) should have joined; that the contract is void, and the plaintiff never acquired title to the note in suit: *Houell v. Barnes* Cro. Car. 382; *Marr v. Peay* 2 Murph. 84; *Roseboom v. Mosher* 2 Denio 61; *Taylor v. Morris* 1. N. Y. 341; *Treadwell v. Cordis* 5 Gray 341–360; *Chandler v. Rider* 102 Mass. 268; *Floyd v. Johnson* 2 Lit. 109; *Hetzel v. Barber* 69 N. Y. 1.

Sherwood, J. Martha Rumney on the 8th day of May, 1875, made her last will disposing of both real and personal estate. The will is as follows:

"*First.* I hereby give and bequeath to my only daughter, Mary E Rumney, the interest and income of the sum of twenty-five hundred dollars, now loaned out on three bonds and mortgages made by James Dewey, Jacob A. T. Wendell and George W Bryant, now in the hands of my attorney. Edward C. Walker, to be kept on interest in the best manner for that purpose by my executors for and during so long a time as she shall remain unmarried; the same to be divided equally between all my children whenever she shall marry.

Second. I desire that my executors shall pay all my just debts, but out of other property than the twenty-five hundred dollars aforesaid, which I desire shall be kept for her support and maintenance so long as she shall remain unmarried.

Third. All the rest and residue of my estate I hereby devise and bequeath to my children, John G. Rumney, Mason P. Rumney, Mary E. Rumney, Benjamin Rumney and Henry R. Rumney, to them, their heirs and assigns forever, to be divided equally between them, share and share alike. In case any of them should die, leaving issue, the issue to take the share that would have fallen to the parent by representation.

Fourth. I will and direct that the share of my estate hereinabove bequeathed and devised to my sons Benjamin Rum-

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ney and Henry R. Rumney, shall remain in the hands of my executors until they reach respectively the age of twenty-five years, receiving meantime the income from the same; leaving it however to the wisdom and discretion of my executors to deliver to them respectively their shares of said estate at any time after they reach the age of twenty-one, or any part thereof, if said executors are fully satisfied in either case that said share will be safely, wisely and judiciously used.

Fifth. I hereby nominate and appoint my son, John G. Rumney, and my friend, Guy F. Hinchman, the executors of this my last will and testament, with full power and authority to sell and convey any real estate of which I shall die seized.

Sixth. Before the partition of my estate I direct my said executors to pay and refund to any and each one of my children any sum or sums they may have advanced for the support and expense of the family between the death of their father and my decease, less the proper value of their own board and maintenance during that period.

Seventh. It is my earnest desire that after my decease my children shall continue to live together and shall constitute one family as heretofore.

Eighth. I direct that my said executors shall not be required to give bonds."

Mrs. Rumney died, and on the 25th day of April, 1875, her will above mentioned was admitted to probate in Wayne county. John G. Rumney duly qualified under his appointment as executor, and letters testamentary were issued to him. Guy F. Hinchman, the other executor named in the will, declined to qualify or act, and John G. Rumney has ever since acted as the sole executor of the will, carrying out its provisions to the best of his ability, and so far as the record discloses, to the entire satisfaction of all the heirs and legatees interested in the will or the estate.

The executor, John G. Rumney on the 4th day of April, 1882, gave to the defendant John Webster an agreement to sell to him the homestead property belonging to the estate. All the heirs and executors were to sign the deed of conveyance. This contract was in writing, and is as follows:

"Whereas, John Webster, of Detroit, Michigan, is negotiating with John G. Rumney, as executor of the estate of Martha J. Rumney, for the purchase of the homestead prop-

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erty of said estate, in the city of Detroit, the same being No. 91 High street east, lot 60 feet front by 165 feet, more or less, deep, the terms agreed upon being as follows, viz.: Said Webster to assume the $5000 mortgage upon said property, and pay in cash enough with $598.25, A. M. Coville & Co.'s note, to make up $1500, at time of delivery of perfect title paper and the balance of $2000 as follows: $500 endorsed note at six months; second mortgage on said property for $1500, due on or before two years from date, with the privilege of paying said $1500, second mortgage, in $500 payments at date interest accrues, viz., semi-annually; said $500 endorsed note to be bankable; trade to be consummated within a reasonable time; all the heirs and executors to be grantors. To secure the fulfillment of this agreement, said Webster has delivered said Coville & Co.'s note, and said John G. Rumney $250 in cash, to Benjamin Vernor, of Detroit, Michigan.

The parties mutually bind themselves to the fulfillment of the above agreement.

JOHN WEBSTER.
JNO. G. RUMNEY,
Executor Estate of Martha G. Rumney.

In presence of
A. E. HAWES.
Detroit, April 4, 1882."

The executor deposited with the plaintiff the $250, and John Webster deposited the note with the plaintiff, mentioned in and required by the contract, and as this Court has heretofore held, for security for the performance of the same. See 51 Mich. 186. Before the sale of the homestead was perfected by giving a deed of the property the note deposited became due, and after the executor had tendered a conveyance to Webster made and executed by all the heirs, in accordance with the contract, and the same had been refused by him, Rumney then claimed he was entitled to the note deposited, and gave the plaintiff a bond of indemnity, took the note and brought suit thereon against both makers and indorser.

Substantially the same matters were set up in defense as are now pleaded in this case. A recovery was had thereon in the superior court of Detroit, and on appeal to this Court

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that judgment was reversed—the Court holding that the present plaintiff, and not the executor, was the proper person to bring suit. That suit was then discontinued, and the note retransferred to the plaintiff, and this suit brought thereon against the makers and indorser.

The declaration is in assumpsit on all the common counts. The defendant pleaded the general issue with notice of several defenses, all indicating the intention of defendant to show on the trial of the case a want of title in the plaintiff and of any right to bring the suit, and that Webster's indorsement of the note was without consideration and invalid.

It is claimed by counsel for the defendants that the power was not conferred upon John Rumney alone, under the will, to make the sale of the homestead property in the contract heretofore given, contemplated, and that his letters of administration gave him no additional power for that purpose; that the power attempted to be used could only be exercised by both persons named in the will as executors, and that no sale of real estate could be made by Rumney alone, except as authorized by the judge of probate; and that the contract which was the consideration of Webster's indorsement and which gave the plaintiff his right to the custody of the note was therefore void, and the plaintiff could not recover. This point raises the only question we deem it necessary to consider, and adopting the counsel's premises, the conclusion to which he arrives necessarily follows.

The question raised is one of much importance to the people of our State. When the case was before this Court before, this question was not finally determined, the proper party plaintiff not then being before the Court. The solution of the question depends upon the proper construction of the will and the statutes relating to the subject. The language of the will under which the executor claims to derive his authority is plain and explicit, and it must be construed the same as though the provisions of the statute relating thereto and applicable were written in the instrument, as they neces-

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sarily constitute a part thereof, and it must be regarded as having been made with reference thereto.

The power of the executor to make sale of the real estate, and the contract for the sale thereof, which we are now considering, is given by the will if at all, and is not derived from any authority conferred by the judge of probate.

It is very clear from the terms of the will, that Mrs. Rumney had great confidence in the persons named as her executors, as they were charged with important discretionary duties, and the exercise of much discrimination and judgment in the disposition, management and control of the property designed for the children, of the most difficult and delicate character. And in such a case, nothing but imperative duty can ever excuse a court in disturbing or interfering with the action taken by the executors.

No question is or can be made about the power of both persons named as executors to do the act in question had both consented to serve and qualified. Hinchman renounced the trust and refused to qualify. His relation to the will and the trust was thereby rendered the same as though he had died. Could the remaining executor execute the powers and trust created under the will when there was no express provision authorizing one of the executors so to do, in case of the death of the other or his failure to qualify? There is no question but that one under such circumstances may exercise the powers and discharge the duties conferred upon both, in the management and disposition of the personal estate, and bind all persons interested therein. Dyer 23; 11 Viners' Abr. 271; Bac. Abr. D. 1; 2 Williams Ex'rs, 810; *Jacomb v. Harwood* 2 Ves. Sr. 267; *Wheeler v. Wheeler* 9 Cow. 34; *Bogert v. Hertell* 4 Hill 492, 503; *Weir v. Mosher* 19 Wis. 311; *Herald v. Harper* 8 Blackf. 170; *Dominick v. Michael* 4 Sandf. 406; *Boughton v. Flint* 13 Hun 206. Co-executors and co-administrators are regarded, in law, as but one person, and acts done by one are deemed the acts of all in all matters relating to the personal estate. One may execute a valid release of a debt. *Murray v. Blatchford* 1 Wend. 583. He may discharge a mortgage. *People v. Key-*

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ser 28 N. Y. 226. May make an assignment of a mortgage. *Cronin v. Hazeltine* 3 Allen 324. And this Court has held that a deed made by one of two or more administrators was not void and not subject to attack in collateral proceedings. *Osman v. Traphagen* 23 Mich. 80.

It is claimed by plaintiff's counsel that the following provision of our statute, if the power did not exist at common law, gives full authority to the one executor in this case to make valid sale of the real estate of the deceased, and authorized him to make the contract in question. The statute reads as follows:

"When all the executors appointed in any will shall not be authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act, and discharge every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose, as if all were authorized, and should act together; and administrators with the will annexed, shall have the same authority to perform every act, and discharge every trust, as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose." How. Stat. § 5844.

I think this provision clearly authorizes the executor in this case to sell the real estate of the deceased mentioned in the will, and to make the contract for the sale thereof, to secure the performance of which the deposit of the note in question and its indorsement were made. Not only is the sale authorized, but the designation of the person and his power to make it are derived solely from the will. The probate of the will and letters testamentary furnish no more than the evidence of the existence of these things, and not the authority for doing them.

I think it may well be doubted whether the provisions of our statute, or that of 21 Hen. VIII. c. 4, so far as it relates to executors, is anything more than confirmatory of the common law upon this subject. *Bonifaut v. Greenfield* 1 Cro. 80; Co. Litt. 113*a*.

Whether this be so or not it is quite certain that the spirit of the law requires that the intention of the testator, as

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expressed in his will, should be carried out. This could be as well accomplished usually by one person as by more; and whatever number may be selected, they are all supposed to be chosen with special reference to their qualifications for the position, and to be prepared to act in accordance with the views and desires of the testator concerning the execution of the trust; and however large the number may be, each is vested with all the powers of the others, and all are required to perform the same duty or duties, and in the discharge of them they act as an individual. But life and ability to act are always uncertain. That the testator may always have some person of his own choosing to execute his will in case of the death or inability of the other to act, is undoubtedly the principal object of appointing two or more executors, and to hold that the inability of one thus appointed to act, or his neglect to qualify, disqualifies the others, it seems to me would manifestly be against the intention of the testator and the true spirit of his will, and defeat the very object he had in view in making the appointment. To remove all doubt upon the subject and secure the construction here contended for, seems to have been the object of the statute upon the subject both in England and this country.

It would in my judgment be a perversion of the true intention and meaning of the statute, and do violence to what I believe to have been for a long time the accepted interpretation of the law by the profession generally in our State, to hold otherwise. It is possible and I think quite probable, that were we to give the statute the construction claimed for it by counsel for the defendant, titles to large amounts of real estate, purchased in entire good faith, and now quietly enjoyed, might become unsettled, and all the evil consequences usually accompanying such action by the courts would follow.

It seems to me there is no sufficient reason for, nor does public policy require such a construction of the law, and it ought not to be given by this Court. The following authorities may be examined with profit in examining the question raised in this case: *Bonifaut v. Greenfield* 1 Cro. 80; *Dike*

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v. Ricks 4 Cro. C. 335; 1 Sugd. Pow. (6th Lond. ed.) 143, 144; *Pitt v. Pelham* Ch. Cas. 178; 1 Lev. 304; *Wardwell v. McDonnell* 31 Ill. 364; *Clinefelter v. Ayers* 16 Ill. 332: s. c. 20 Ill. 463; *Conklin v. Egerton* 21 Wend. 430; *Roseboom v. Mosher* 2 Denio 61; *Wills v. Cowper* 2 Ham. 124; Powell, Devises, 196, 197; *Judson v. Gibbons* 5 Wend. 224.

I think the executor in this case had the power to make sale of the homestead property of the Rumney estate, and the contract made therefor, and that the indorsement and transfer of the note in question were not without consideration, and must be held valid.

It is unnecessary to consider the case further. This disposition of the main question raised, renders it necessary to reverse the judgment, and a new trial must be granted.

CAMPBELL and CHAMPLIN, JJ. concurred.

COOLEY, C. J. The question in this case arises under the statute which provides that "when all the executors appointed in any will shall not be authorized, according to the provisions of this chapter to act as such, such as are authorized shall have the same authority to perform every act, and discharge every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose, as if all were authorized, and should act together; and administrators with the will annexed, shall have the same authority to perform every act, and discharge every trust, as the executors named in the will would have had, and their acts shall be as valid and effectual for every purpose." How. Stat. § 5844. Another statute provides that "when a power is vested in several persons, all must unite in its execution; but if, previous to such execution, one or more of such persons shall die, the power may be executed by the survivor or survivors." Id. § 5628.

In this case two executors were named in the will, one of whom declined to qualify, but is still living. The other qualified and acted. The question discussed in the case was whether it was competent for him alone to execute, not for purposes of administration and long after the time for the

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settlement of the estate under the statute had expired, a power which by the will was conferred upon both. It is an interesting and important question, and was ably argued, but is not discussed in the opinion of Mr. Justice Sherwood, which treats the case as if the power had been executed as a step in administration. No one has ever doubted, so far as I know, that for administration purposes the acting executor might execute such a power, and no authority beyond the statute itself is needed in support of such an execution. Whether a case like the present is within the intent of the statute first recited is quite a different question, which I do not discuss, because the prevailing opinion in the case avoids any mention of it.

WILLIAM H. EBERTS ET AL. v. AARON C. FISHER ET AL.

Lease—Insurance and taxes—Appraisal of improvements—Tenants-in-common—Partition.

1. A lease provided that the lessee should keep the property insured and should assign the insurance policy to the lessor. *Held*, that in equity no formal written assignment was needed, and if there was none the stipulated insurance would be deemed to be held in trust.

2. A lessee's omission to pay a paving assessment could not properly be treated as a breach of his contract, if it arose from a question as to the validity of the assessment, and if he paid it when its validity was settled.

3. A lessee of land agreed to put up a building thereon, the value of which was to be appraised at the expiration of the lease, when the lessor, after proper notice, could have the building on paying its value, or the lease should be extended. *Held*, that an appraisal of the building was unnecessary where no notice was given of a purpose to terminate the lease. And an appraisal of the land by mutual consent was equivalent to an agreement that the lease should be continued, and should not be interfered with by partition where the parties to the lease were tenants-in-common.

4. A tenant-in-common may enter into such agreements as to estop himself from enforcing his right to a partition of the premises.

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Appeal from the Superior Court of Detroit. (Chipman, J.) June 13.—June 25.

BILL to terminate lease and for partition. Complainants appeal. Reversed.

Henry M. Campbell and *Alfred Russell* for complainants.

E. Y. Swift and *Chas. M. Swift* for defendants.

CHAMPLIN, J. In 1860 Phillis Eberts was the owner in fee of lot No. forty-four, in section eight of the Governor and Judges' plan of the city of Detroit, then vacant and unoccupied, and on the 12th day of March of that year she executed a lease of the premises to one Lansing for twenty years at a ground rent of $1050 for the first ten years, and $1200 for the next ten years, upon the covenants and conditions following:

1. That the lessee should pay, as the same should become due, the rent aforesaid quarterly on the first days of August, November, February and May.

2. That the lessee should pay, as the same should become due, all special and general taxes and assessments, and annually exhibit on demand to the lessor the vouchers for the payment of the same.

3. That the lessee should keep the buildings to be erected on the lot insured in at least $5000 by policies to be taken in the name of the lessor, or assigned to her, and should annually produce and exhibit on demand to the lessor the certificate of renewal of said insurance.

4. That the lessee should erect on the premises leased, within six months from May 1, 1860, a block of well-built, good and substantial brick stores, not less than four stories high, besides basement.

5. In case of loss or damage by fire, the building should be repaired or rebuilt within one year thereafter by the lessee, or his heirs or assigns.

6. If the lessor should, by the neglect of the lessee, have to pay any tax or assessment or premiums of insurance, the

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amount so paid should be considered as a part of the rent, and be due and payable the next quarter-day thereafter.

7. That within the last year of the lease, at a time to be mutually agreed upon by the parties, their heirs or assigns should, at the request of either of them, each select a freeholder of the city of Detroit as an appraiser, which two should select a third, who should appraise the value at that time of the lot, separate from all improvements thereon, and also the cash value of the buildings and the improvements; which appraisal shall be in writing, in duplicate, and delivered to each party, their heirs and assigns; and thereupon the lessor should at her option have said improvements on paying the appraised value thereof on the termination of the lease, of which option she should give the lessee at least sixty days' notice before the termination of the lease, and if no such notice should be given, then the lease should be extended ten years from the first day of May, 1880, at an annual rent of five per cent. upon the appraised value of the lot, without the improvements, subject to all and singular the other conditions of the lease, and at the expiration of the thirty years if extended to that time, all the buildings and improvements of every kind and character should be and become the property of the lessor, her heirs and assigns.

8. That said buildings should be kept in repair.

There was a provision for re-entry in case of condition broken, or non-performance of any of the covenants. The term was to commence on the 1st day of May, 1860, previous to which time—namely, March 19, 1860—Lansing assigned the lease to Elam Fisher and Aaron C. Fisher.

Phillis Eberts died on the 18th day of April, 1876, leaving a last will, by which she bequeathed this property to Herman F. Eberts, William H. Eberts, Marie Louisa Eberts, John Meldrum Eberts, Robert Jerome Eberts, Charles H. Eberts, William Eberts, Nancy Waddell, Henry Eberts, Catharine Taylor and Frances Smith. After the death of Phillis Eberts and before the filing of the bill in this suit, Herman F. Eberts assigned his interest in the property to Hiram Walker. Rob-

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ert Jerome, Charles H., William and Henry Eberts, Catharine Taylor, Nancy Waddell and Frances Smith conveyed their interest to defendants Aaron C. Fisher, and Aaron C. Fisher and John H. Van Schoick, executors of the last will of Elam Fisher, deceased; Elam Fisher having died previous to the commencement of suit. The record does not disclose the date of the conveyance to defendants. These transfers leave the complainants the owners of four-elevenths, and the defendants the owners of seven-elevenths, of the property leased. There was no notice given by the lessor or her representatives of the option provided for in the lease, and on the 2d day of April, 1880, appraisers who had been mutually chosen in the manner provided for in the lease appraised the land without the improvements at $52,000.

On the 19th day of June, 1880, the complainants filed this bill, setting up the state of the title and the lease, and averring breaches thereof, substantially as follows: (1) That the defendants failed to pay a special paving assessment on said property, for the paving of Woodward avenue, becoming due July 1, 1878, whereupon said lease became terminated, and the complainants' right of possession accrued; that the defendant Elwood purchased said property at a sale thereof to pay said assessment, March 15, 1880, for the term of ninety-nine years. (2) That the defendants failed to keep the building insured in the name of the lessor or her heirs or assigns, or to assign the policies to her or them, and have not kept the building insured for the benefit of the lessor, her heirs or assigns, in any amount whatever. (3) That the defendants have failed to keep the building in good repair; that they have suffered the roof to become so defective that the water leaks through in large quantities and does great injury to the building, and that, owing to the defective roof and defective eaves, the water runs down the rear walls of the building, and by soaking into the mortar between the bricks and freezing there, has so damaged the walls that the water penetrates during storms, runs into the interior and causes great damage. (4) That the defendants failed to have a proper appraisal made containing an estimate of

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the cash value of the building separate and apart from the land.

The bill charges that the defendants are in possession, and because they hold the title in fee to seven-elevenths, and are tenants in common with the complainants, the latter cannot re-enter and occupy, and their only remedy is in equity by partition. The complainants ask a decree that the lease has become terminated, and that their right to the possession or occupation has accrued, and for a partition.

The defendants answered, and proofs were taken. On the hearing in the court below a decree was entered declaring the ownership and title to the land as alleged in the bill; also declaring the leasehold interests in the premises, and the parties who were the owners thereof; adjudging the lease to be in full force and effect, and that it had not been determined and ought not to be determined by reason of any of the alleged breaches of the conditions thereof by the defendants, set forth in the bill of complaint; and dismissing the bill as to the alleged forfeitures, and decreeing partition of the premises between the parties complainant and defendant.

The defendants failed to pay a special assessment for paving. The proof shows that it was considered by some property owners who were assessed, as illegal, and its validity was contested in the courts. It was found to be valid and then the defendants paid the assessment and the lien was discharged. The insurance was at first assigned to the lessor, but after a year or two the practice was discontinued, apparently by tacit consent of all parties. No complaint seems to have been made because the insurance was not assigned. The buildings were in fact kept insured for a much greater amount than five thousand dollars, and in a court of equity, that amount would be held in trust for the lessor, and treated as assigned without any formal written assignment.

The proof shows that the appraisement was made by the mutual arrangement of the parties, and that no notice was given by the lessors of their option to terminate the lease and pay the appraised value of the improvements. It was therefore unnecessary to appraise the value of such improve-

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ments, and the appraisement as made cannot be held to constitute a breach of the condition of the lease. The appraisers fixed the amount upon which the lessees should pay five per cent. as rental for the succeeding ten years, and that fully accomplished the purpose of this covenant of the lease. Neither do we feel justified in holding that there has been such a breach of the covenant to repair as would operate as a forfeiture of the rights of the lessees under the lease. Upon a careful examination of the proofs we should affirm that part of the decree of which complainant complains. But we think the court below erred in decreeing a partition.

As a general rule it is a matter of right for a tenant in common of lands to have partition. But this rule is not of universal application. A party may enter into such agreements with his co-tenant as to estop him from enforcing the right of partition. This principle was recognized and applied in *Avery v. Paine* 12 Mich. 540; and when in this case, instead of terminating the lease at the end of twenty years, the complainants and defendants, by mutual consent, obtained an appraisal of the premises, it was in effect an agreement that the premises should be held by the lessees ten years longer under the terms of the lease; and in view of the relation of the parties to the fee and reversion, it was as plainly implied that such relations should not be interfered with by partition, without mutual consent, so long as the terms of the lease were kept and performed by the lessees. Counsel for complainant admit that unless the lease has been terminated by breach of the conditions thereof, a partition is neither desirable nor asked for. Both parties concede that a partition cannot be made without sale, and that a sale subject to the lease would sacrifice the rights of the parties.

The decree of the Superior Court awarding partition must be reversed, and the bill of complaint dismissed with costs of both courts in favor of the defendants.

The other Justices concurred.

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MARGARET P. TURNER ET AL. v. NELSON HOLLAND ET AL.

Navigable waters—Exclusion of riparian rights—Demurrer.

A bill in equity claimed riparian rights upon a bayou and title to the middle of its channel. These facts being admitted by general demurrer, it was *held* that complainant could maintain his bill for relief against his grantor if the latter asserted title to the bayou, and so obstructed it by filling it with saw-logs as a booming-ground, that the riparian grantee was excluded from it.

Appeal from Saginaw. (Hart J.) June 13–17.—June 25.

INJUNCTION bill. Defendants appeal. Affirmed.

Camp & Brooks and *B. M. Thompson* for complainant.

Wisner & Draper and *Tarsney & Weadock* for defendants.

CHAMPLIN, J. The bill of complaint in this case states that complainants are owners in fee of certain lots situated upon Hoyt's subdivision of the James Riley reserve, in the county of Saginaw; that this reserve is situated on the east bank of the Saginaw river, having about one mile front on the river, and extends west to the thread of the main channel of said river; that crossing said reserve and extending the whole length thereof and forming part of said river is a bayou called Emerson's bayou, and between that bayou and the main channel of Saginaw river is a middle-ground extending the whole length of said reserve, and for some considerable distance beyond on the north and forming a part thereof; that this bayou was formerly connected with the main channel of the Saginaw river at the south as well as at the north; that in front of complainants' lands the bayou is navigable for vessels drawing nine feet of water, and prior to the acts of defendants complained of, was used for the purpose of navigation and commerce; that their lands are bounded on the west by Emerson bayou, and in truth and in fact extend to the center line of the channel thereof, and

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that complainants are now the owners in severalty thereof; that the riparian rights in said Emerson bayou are very valuable to complainants, and enhance the value of their lots $1000 or more each; that Jesse Hoyt, their grantor, has, since he conveyed to complainants, assumed to own the soil under the water in the Emerson bayou, in front of complainants' lots, and under such assumed claim has transferred to defendants the right to use the bayou in front of complainants' lands for booming and storing saw-logs; that defendants have inclosed and converted the Emerson bayou in front of complainants' land into booming grounds by driving piles in and across the bayou at suitable distances, and connecting them with boom-sticks, thus cutting off all egress and ingress to complainants' lands from the channel of the bayou; that they threaten to continue the maintenance of said booms, and to fill the same with saw-logs to the great injury of complainants, and to exclude them from the use of the bayou and every portion thereof, and from ingress and egress to their lands; that the claim made by Hoyt that he is the owner of Emerson bayou, and has the right to control the use of the same to the exclusion of complainants severally, of their use and enjoyment of their riparian rights therein, constitutes and creates a cloud upon the title of complainants severally, in the several parcels of land owned by them, and diminishes the market value of each of said parcels of land in the sum of $1000 and over; that each of complainants is now and has been in the actual possession of the lot or parcel of land owned by him or her, and each, except Judd, Doty and Wood, has made valuable improvements thereon of the value of $10,000 or more, in the erection of dwelling-houses and out-buildings.

To this bill the defendants interposed a general demurrer for want of equity, which on hearing in the court below was overruled, with leave to plead or answer; from which decree the defendants have appealed to this Court.

We think the facts stated in the bill of complaint make a case of equitable relief. The bill claims that complainants have riparian rights in the navigable waters of Emerson's

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bayou, and that their title as such riparian owners extends to the center line of the channel of the bayou. The effect of the demurrer is to admit the truth of all facts which are well pleaded.

The decree of the circuit court overruling the demurrer is affirmed, and the cause remitted to the court below for further proceedings. The defendants may answer upon payment of the costs imposed by the court below within twenty days after notice that the record has been returned to that court, and in default thereof their default may be entered, and complainants may proceed to decree according to the rules and practice of the court. The complainants will recover the costs of this Court.

The other Justices concurred.

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William Alt v. John E. Lalone.

Certiorari—Conclusiveness of return—Entry of judgment on verdict—Misconduct of trial.

1. Certiorari to a justice does not have the force of a writ of error; and it only brings up such matters as appear by the return to have been known to the justice officially. And nothing can be added to the return by testimony.

2. A jury's verdict in justice's court is conclusive; the justice cannot set it aside nor make it invalid by neglecting to enter judgment on it at once; the law supplies the judgment if not entered, and its subsequent entry in accordance with the verdict is proper.

3. Whether a compromise upon a verdict or the sheriff's presence in the jury room can be noticed on error without some action in the trial court—Q.

Error to Wexford. (Fallass, J.) June 17.—June 25.

Trespass. Defendant brings error. Affirmed.

Parks, Dunham & Dunham for appellant. A statute

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which provides that a justice shall forthwith render judgment upon the verdict, requires it to be rendered instanter; by delay he loses jurisdiction and the judgment is void: *Hull v. Mallory* 56 Wis. 355; *McNamara v. Speers* 25 Wis. 539; *Perkins v. Jones* 28 Wis. 243; *Wearne v. Smith* 32 Wis. 412; *Kleinsteuber v. Schumacher* 35 Wis. 608.

Pratt, Hatch & Davis for appellee. A verdict in justice's court is equivalent to a judgment: *Gaines v. Betts* 2 Doug. (Mich.) 98; *Overall v. Pero* 7 Mich. 315; *Zimmer v. Davis* 35 Mich. 39; it ends the case and the justice has only to enforce it: *O'Brien v. Tallman* 36 Mich. 13; and a court of review should render a verdict in harmony with the rights of the parties: *Cheney v. Russell* 44 Mich. 620; *Hart v. Lindley* 20 Mich. 50; and based on the proceeding had before the justice so far as he can return on personal knowledge: Tiff. Justice Guide 512.

CAMPBELL, J. Plaintiff sued defendant before a justice for assault. The case was tried by jury and they found a verdict in plaintiff's favor for $16.70. Defendant brought certiorari, and the grounds alleged were misconduct of the jury, and delay of the justice in rendering judgment.

The objections to the action of the jury were the presence of the sheriff during their deliberations, and their compromising on a verdict.

The justice returned that he had no knowledge of either of these alleged facts, but had heard of them afterwards.

Under our statutes a justice cannot grant a new trial, and has no power to inquire into what takes place outside of his knowledge. If nothing is returned on his knowledge which would affect a judgment prejudicially, it cannot be reversed on certiorari. The fact that he may have heard of something which he has no means of searching out, can have no more importance than if any one else reported similar matters. Under the settled practice in this State, a justice's return of what he knows officially must determine the result of a certiorari. There is no authority to go beyond this.

The defendant, if dissatisfied with the judgment, could have procured a new trial on the merits by appealing. There

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is no good reason why certiorari should be allowed to defeat a proceeding entirely where errors may or may not have affected the result. And while we may be required to consider any error which appears from the return, and give it such weight as the law requires, we cannot give to this writ the force of a writ of error in fact, even supposing that such complaints as are made here could be investigated on such a writ without action in the court below, which is not very clear to us, and on which we need not dwell. The return to the writ is all that we can consider. It cannot be added to by testimony.

The complaint of the delay in entering judgment is that the jury found their verdict on the evening of one day, and judgment was rendered the day after.

It is enough to say that where a case is tried by jury their verdict is conclusive, and cannot be invalidated by any action or non-action of the justice. *Overall v. Pero* 7 Mich. 315. When the statute requires a justice to enter judgment immediately on such a verdict, it does so on the ground that he has no judicial duty in such a case, and must act ministerially in recording their action. He cannot set it aside; and if his entry of judgment is postponed, yet the law itself supplies it whether entered or not, and its subsequent entry in accordance with the verdict is entirely proper.

The judgment of the circuit court sustaining that of the justice must be affirmed.

The other Justices concurred.

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Nicholas Trompen v. Jan Verhage.

Sheep-killing dogs—Double damages.

Double damages are recoverable for the destruction of sheep by a dog even when the dog's owner is ignorant of his vicious nature. How. Stat. § 2119.

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Error to Ottawa. (Arnold, J.) June 17.—June 25.

CASE. Defendant brings error. Affirmed.

Geo. W. and *P. H. McBride* for appellant. Double damages are not authorized unless the conduct complained of was malicious or reckless: *Elliott v. Herz* 29 Mich. 202.

Parks, Dunham & Dunham for appellee.

COOLEY, C. J. The principal question in this case, and the only one we deem it necessary to consider, is whether, under § 2119 of Howell's Statutes, the plaintiff who sues for the destruction of sheep by dogs, is entitled to recover double damages without proof that the owner of the dogs was aware of the vicious nature of the dogs. We think the statute in very plain terms authorizes it. After expressly giving double damages, it then in immediate connection provides that "it shall not be necessary, in order to sustain an action, to prove that the owner or keeper knew that such dog was accustomed to do such damage or mischief." This plainly refers to the action for double damages which is given in the first part of the section.

Other questions need no attention.

The judgment must be affirmed.

The other Justices concurred.

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GENESEE COUNTY SAVINGS BANK v. OTTAWA CIRCUIT JUDGE.

Costs—Expenses of taking care of attached goods.

1. A re-taxation of costs to include the expense of taking care of property attached in the case was properly *denied* where the affidavit for taxation did not give the names and identify the services of those whom plaintiff claimed to have paid, nor itemize the expenditures.

2. An affidavit for the taxation of costs should itemize them with exactness especially if those to be charged with them are not interested alike.

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3. Expenses of taking care of goods under attachment are not, *it seems*, a lien on the property after the goods have been released by a supersedeas bond and the case is ended; and it is doubtful if such expenses are taxable as costs.

Mandamus. Submitted June 17. Denied June 25.

Harrison Geer for the writ.

H. C. Akeley and *Isaac P. Christiancy* against.

CAMPBELL, J. A mandamus is sought to compel respondent to vacate an order refusing to set aside taxation of costs and order a re-taxation in the case of *Genesee County Savings Bank v. The Michigan Barge Co., Edward P. Ferry and Thomas W. Ferry.* That suit was begun in February, 1883, for a claim of $5000 and a little interest, by levy of attachment on eight barges, appraised at $44,000, and lands appraised at $187,340. This attachment was by the circuit judge of Ottawa county dissolved in June, on an application made in May. This was reversed on certiorari by this Court in December, 1883. [52 Mich. 164.] Meanwhile judgment was rendered in the suit in September, 1883, and costs were taxed in due form by the clerk. This judgment was removed to this Court on writ of error, and a supersedeas bond was given at once. The judgment was afterwards affirmed in January, 1884. [52 Mich. 438.] March 10, 1884, an affidavit was made on behalf of relator, setting up inadvertence in preparing the taxed bill, and claiming that plaintiff had made expenditures for the keeping and other services in connection with the attached property, which were described as $877 paid to ship-keepers for taking care of and watching the barges from February 3 to September 8; $24 paid deputy sheriff for similar services; and $23 paid to tug for their removal.

The circuit judge was of opinion that the delay of relator in applying for re-taxation after nearly six months had passed, and two regular terms of court had intervened, was not sufficiently explained. He was also of opinion that the affidavit —assuming that such expenses were taxable—did not set out

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sufficiently either the items themselves or the circumstances and necessity for them, and that such items were not such as the clerk could tax. And having exercised his discretion upon the various matters set up in the affidavits, he submitted that mandamus ought not to lie to review it.

The affidavit is entirely defective in not pointing out the names and services of the different persons to whom plaintiff claimed to have made the payments. There is no statement that these payments were made by the sheriff or to him, or that they were made in a round sum or at the same time. It has always been required that items of expenditure for taxation should be separately and definitely set forth so that each may be dealt with on its merits. It appears from the return that the bill of costs actually taxed included sheriff's fees. In the absence of any more definite showing, it would be impossible on any theory of liability to determine relator's rights. The affidavit presented to the circuit judge was designed to procure relief on the facts which it stated, and it was certainly insufficient.

The importance of more exactness is the more manifest when it is considered that here were eight different barges and a large amount of land, which the sheriff would be censurable for levying on, unless, as is probable, there may have been incumbrances and adverse claims. It would depend very much on the condition, not only of the property itself, but of the title and incumbrances, what care was needed, and who was most interested in its care. The theory of this application is that the defendants were the only persons interested; but it appears affirmatively that the property was not the joint property of the defendants, so that they were not all interested jointly in its care, and it is quite possible that there may have been mortgagees or other incumbrancers entitled to rights, which may have had an important bearing on both the continued possession and the value of defendants' interest in the several vessels.

While we were asked to consider the rights of plaintiffs and sheriffs to collect, in one shape or another, expenditures touching attached property, we cannot do so without better

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means of judging. The attached property, which might have been sold on execution, was released by the supersedeas bond, and we have discovered no authority for making such expenses a lien on the property after such action. The case does not show how far the sheriff had any part in these expenses, and it would seem that this may have something to do with determining the character and extent of liability. But it is enough to say now, that the authorities laid before us do not sanction the idea that such items can be taxed in the ordinary way as costs, or that they come within the jurisdiction of a taxing officer. This being so, it is not quite safe to lay down rules for a case not before us. The circuit judge acted rightly, and within his authority.

The mandamus must be denied with costs.

The other Justices concurred.

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David D. Parker v. Board of Trustees of Portland.

Approval of liquor bonds.

Mandamus to compel a village board to approve a liquor dealer's bond will be denied if there is nothing to show that the refusal to approve it was capricious, or to rebut the presumption that the board has fairly passed upon all the questions which determine the sufficiency of the bond and the reliability of the sureties.

Mandamus. Submitted June 17. Denied June 25.

Allen B. Morse and *A. A. Ellis* for relator.

Isaac P. Christiancy against.

Sherwood, J. The petition in this case is for a mandamus to compel the respondents, who are the president and board of trustees of the village of Portland, to comply with his request to approve his liquor bond, tendered by him to them for that purpose. The board, which consists of the president

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and six trustees, had previously fixed the penalty in this class of bonds at the sum of six thousand dollars. The petition shows that on the 28th day of April, 1884, he presented a bond to said board in due form and for the necessary amount, signed by himself and two sureties. Each of them made affidavit that he was worth $6000 over and above all indebtedness and exemptions from sale on execution, and all liability on other similar bonds, and the petitioner avers that said sureties were well worth more than $6000 each over and above all liabilities and exemptions mentioned; that the board laid the petition on the table, taking no other action thereon, and adjourned; that on the evening of the 2d day of May following, the board again held a regularly called meeting, and all were present; that the petitioner with his bondsmen attended this meeting, prepared to answer all questions as to their financial responsibility, but none were asked; that said bond was taken from the table and by a unanimous vote it was disapproved, and the action so taken duly recorded; that no reason was assigned by the board for the disapproval.

And the petitioner further represents that in no meeting of the board, nor on the part of any member thereof privately, was there found any fault with the financial sufficiency of the sureties, or either of them; and he further avers that the reason for the board rejecting said bond was because said board was opposed to the sale of liquor under any circumstances, and were under a pledge "not to approve any bonds whatever of this character, without reference to the sufficiency of the bond in form, or the sufficiency of the sureties thereto;" that two members of the board were elected in the spring of 1884 upon a ticket which was claimed by its supporters, and so understood generally, to be a temperance or prohibition ticket, and the members thus elected would not approve any liquor bonds whatever, under any circumstances; that another was elected to fill a vacancy upon the same pledge, and the three others of the trustees held the same views; that privately several members of the board of trustees have said that under no circumstances would they approve any liquor bonds, and "that in fact the

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action of the board has been and is taken with the plain and avowed purpose of enforcing the prohibition of the sale of liquors except at drug-stores in the village of Portland, in direct violation of the laws of this State, and in plain and manifest disregard of their duty under the statute and the right of petitioner," and claim the right of the board so to do. He further avers that he is ready to give a good and sufficient bond, as provided by law, at any time when the board shall inform him of any error, either in substance, form or sufficiency of sureties, in the bond already presented, and asks this Court to compel the board to indorse its approval.

The affidavit of Mr. Morse, the attorney for petitioner, shows that he, accompanied by the petitioner and another attorney, appeared before the board in his behalf at a subsequent informal meeting called by the president to consider the subject of the disapproval of the bond, and that Mr. Morse gave the members present his views of the same, and the duty of the board, and respectfully asked them to assign a reason for rejecting the bond presented, and they refused so to do; that afterwards the petitioner's attorneys attended a regular meeting of the board and renewed their application for approval of the bond with the same sureties, and asked the board to assign reasons for its rejection, stating that if any defect or insufficiency existed the petitioner was prepared to submit a new bond; and the board made no response thereto.

Five of the trustees make return to this writ and answer under oath, and say the board at a called meeting took action upon this particular bond and disapproved of the same, without stating their reasons for their respective votes. They admit the presentation of the bond for their approval by Mr. Morse, with the request for a statement of their reasons for their action taken in rejecting it, and that they did not comply with such request, considering the matter already disposed of at the former meeting, and that they were not bound to give the reasons for their former votes.

They further state that the true reason for their refusal to

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approve the bond, and which they believe influenced all the members in voting against approval, was that they were not satisfied and did not believe that the sureties were responsible, and this they still believe to be true; and that they were not influenced to refuse their approval for the reason stated in the relator's petition, or under any pledges before or after their election which could in any way interfere with the fair and impartial discharge of their official duties in approving or rejecting any such bond, and that they have never attempted in any of the matters set forth in the petition, or intended to defeat the statute under which the bond is required, or any other law of this State, and they avow their willingness and readiness to carry this law and all other laws touching their official duties, into effect in good faith.

The answer seems to be full, and contains a complete denial of all the material matters contained in the relator's petition.

Municipal corporations are invested with many powers both of a legislative and judicial character, which are usually, in villages, vested in a board of trustees; and there is no doubt about the duty of the courts to compel by mandamus the proper performance of their corporate duties, and compel action upon matters falling within the scope of their well-defined powers. And it is well settled, in all matters resting in the judgment and discretion of such boards and upon which they have actually passed, mandamus will not lie to control their decision or action when made or taken in good faith. High on Ext. Leg. Rem. § 323; *Sandlake v. Berlin* 2 Cow. 485; *Pfister v. Bd. of Com'rs* 82 Ind. 382; *Albin v. Bd of Directors* 58 Iowa 77. When proper action has once been taken in this class of cases, it is not the duty of any appellate court to compel a rehearing. High on Ext. Leg. Rem. § 328.

How. Stat. § 2278[1] requires the relator, before commenc-

[1] § 2278. (Sec. 9.) Every person engaged in the sale of any spirituous, malt, brewed, fermented or vinous liquors, except druggists, shall, before commencing such business, and on or before the first day of May in each and every year thereafter, make, execute, and deliver to the county treasurer of the county in which he is carrying on such business, a bond, the

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ing the business of selling liquor, to give a bond to the county treasurer, with "two or more sufficient sureties, who shall be freeholders and residents of the village," each of whom shall justify in a sum equal to the amount of the bond, and before it can be received its sufficiency must be determined by the board.

This duty necessarily invests the board with large discretionary power. The things which will create a liability on the bond, if they ever exist, are to arise in the future; and it is to guard against these future contingencies, and to secure future responsibility for an injured party, where a breach occurs, that the bond is made to provide. It will be noticed that the statute not only requires that the sureties shall

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sufficiency of which shall be determined by the township board of the township, or the board of trustees, or the common council of the village or city in which such business is proposed to be carried on, to the people of the State of Michigan, in the sum of not less than three thousand dollars nor more than six thousand dollars, with two or more sufficient sureties, who shall be freeholders and residents of the township, village, or city in which such business is proposed to be carried on, each of whom shall justify in a sum equal to the amount of the bond over and above all indebtedness, and all exemptions from sale on execution, and all liability on other similar bonds, which bond shall be substantially in the following form:

"Know all men by these presents, that we, ———, as principal, and ———, as sureties, are held and firmly bound unto the people of the State of Michigan in the sum of ——— dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals, and dated this ——— day of ———. A. D. 18—.

Whereas, the above-named principal professes to carry on the business of ——— (and describing the place of business) ———, at ———, in the county of ———;

And whereas, the said principal hath covenanted and agreed, and doth hereby covenant and agree, as follows, to wit: That he will not directly or indirectly, by himself, his clerk, agent or servant, at any time sell, furnish, give, or deliver any spirituous, malt, brewed, fermented, or vinous liquor, or any mixed liquor, a part of which is spirituous, malt, brewed, fermented, or vinous, to a minor, nor to any adult person whatever who is at the time intoxicated, nor to any person in the habit of getting intoxicated, nor to any Indian, or any person of Indian descent, nor to any person whose husband, wife, parent, child, guardian, or employer shall forbid the same; and that he will pay all damages, actual and exemplary, that may be adjudged to any person for injuries inflicted upon them, either in person or property, or means of support, by reason of his selling, furnishing, giving, or delivering any such liquors:

Now, the condition of this obligation is such that if said principal shall well and truly keep and perform all and singular the foregoing covenants and agreements, and shall pay any judgment for actual or exemplary damages which may be recovered against him in any court of competent

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justify, but that the sufficiency of the bond shall be determined by the board, which evidently includes something more than simply ascertaining the amount of property the sureties are worth. Are they residents of the village? and, if so, how long do they intend to remain such? Where is their property located, and in what does it consist? What is the character of the parties who are sureties? Are they good, honest, reputable citizens, or are they law-breakers and dishonest persons? These and other inquiries suggest themselves as proper for consideration in passing upon the sufficiency of the bond; and when they have all been taken into account in determining the question submitted to the board (as it is presumed they must have been in this case),

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jurisdiction, then this obligation shall be void and of no effect, otherwise the same shall be in full force and effect.

Signed and sealed in the presence of

_____ [L. S.]
_____ [L. S.]
_____ [L. S.]"

There shall also be annexed to each bond required by this act an affidavit of each surety thereto, which affidavit shall state that the affiant is worth a sum equal to the amount of the bond over and above all indebtedness, and exemptions from sale on executions, and all liability on other similar bonds; and if, in the judgment of the township board, or the boards of trustees, or common council of the village or city in which said business is proposed to be carried on, said sureties, or either of them, are not worth the full sum mentioned in said bond over and above all their liabilities, and exemptions and liabilities on other similar bonds, they, the said township board, or board of trustees, or common council of the village or city, as the case may be, shall refuse to indorse said bond with their approval. Such bond shall not be received unless the approval thereof by the township board, or board of trustees, or common council of the village or city, shall be duly certified thereon in writing, and the principal shall not be allowed to sell spirituous, malt, brewed, fermented, or vinous liquors in any other building or place than that specified in said bond without giving notice, and executing another bond in the manner above prescribed. Whenever any condition of said bond shall be broken, a new bond shall be required by the county treasurer with whom such bond was originally filed, and also in case of the death, insolvency, or removal of either of the sureties, and in any other contingency that he shall determine requires it. And it shall not be lawful for any person to sell any of the liquors mentioned in sections 1 and 2 of this act, after being notified by the county treasurer to procure a new bond, until said bond shall have been executed, approved by the proper board, and filed with the county treasurer; and any sale made in violation of this section shall be a misdemeanor, and shall be punished as provided in section 6 of this act; and in all actions brought upon said bond for damages by reason of the violation of any of the provisions thereof, the plaintiff in such action shall, in the event of recovering a judgment of any amount, also recover his costs of suit.

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and the board exercising its discretion upon the subject, in good faith and without abuse of such discretion approve or reject the bond, such determination is final and this Court cannot disturb the determination thus made.

Municipal corporations usually speak from the record or by attorney. In this case the decision of the board of trustees was placed upon their record. The reasons therefor, however, do not appear in the record; neither does the statute require any such thing. Still I fail to see any good reason why the board did not give the attorney for relator, or the relator himself, the information he desired. Common courtesy, it would seem, required as much as that, although at the time the information was called for they were under no legal obligation to comply with the request; and had it appeared, as claimed in the petition, that the rejection of the bond was the result of prejudice and caprice, it would have been our duty to grant relief. We however do not find such to have been the fact, and the writ must be denied, but without costs.

COOLEY, C. J. concurred.

CAMPBELL, J. I concur in the result.

CHAMPLIN, J. I cannot concur in the views expressed by my brother Sherwood, nor the result reached by the majority of the Court in this case.

The village of Portland is incorporated under a special charter. No authority is conferred by it upon the board of trustees to prohibit or restrain traffic in intoxicating liquors. The general law of the State recognizes such traffic as legal, but subjects persons engaging in it to restrictive regulations, calculated to protect the public against abuses liable to arise from unrestrained sale of spirituous liquors. Among these provisions is the requirement that every person engaged in the sale of spirituous, malt, brewed, fermented or vinous liquors, except druggists, shall before commencing such business make, execute and deliver to the county treasurer a bond, the sufficiency of which shall be determined by the

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township board of the township, or the board of trustees, or the common council of any village or city in which it is proposed to carry on such business, in the sum of not less than three thousand dollars nor more than six thousand dollars, with two or more sufficient sureties who shall be freeholders and residents of the township, village or city, each of whom shall justify in a sum equal to the amount of the bond over and above all indebtedness and all exemptions from sales on execution, and all liability on other similar bonds. The statute then gives the form of the bond, and provides that the bond given shall be substantially in that form. It further provides that the sureties shall make affidavit and annex it to the bond, in which they shall state that they are worth a sum equal to the amount of the bond over and above all indebtedness, and exemptions from sale on executions, and all liability on similar bonds; and if in the judgment of the township board, or board of trustees, or common council of the village or city, said sureties, or either of them, are not worth the full sum mentioned in said bond, over and above all their liabilities and exemptions, and liabilities on other similar bonds, they shall refuse to indorse said bond with their approval. The statute also provides that whenever the condition of the bond shall be broken, a new bond shall be required by the county treasurer with whom such bond was originally filed, and also in the case of death, insolvency or removal of either of the sureties, and in any other contingency that he shall determine requires it.

The provision of the law requiring the board of trustees to determine the "sufficiency of the bond," as well as of the sureties, means no more than that they shall determine whether it complies substantially with the form and conditions specified in the statute. In my judgment these words contain no such hidden meaning as authorizes the trustees, in determining the sufficiency of the bond, to inquire after the intention of the sureties as to the length of time they intend to remain residents of the village. The law has provided for the contingency which might arise of the removal of the sureties from the village, as well as their

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insolvency, and authorizes the county treasurer to require a new bond in such case. The character of the sureties, their respectability or their honesty, has no more to do with the "sufficiency of the bond" than the fashion of their clothes or the church they attend. The term "sufficiency of the bond" has reference solely to its legal sufficiency, as tested by the requirements of the statute, and not to the moral character or standing of the sureties in the community. The questions as to what property they have, and where it is situated, are proper in determining the sufficiency of the sureties. The affidavits required by law to be annexed to the bond make a prima facie showing of the sufficiency of the sureties, and if the board of trustees are not satisfied, it is their duty, by further inquiry, either of the sureties themselves or from other sources, to obtain such information as will enable them to act candidly and impartially upon the question of approval.

In passing upon the question of the sufficiency of the bond and sureties the board act ministerially and not judicially. The act of approving or rejecting a bond is essentially a ministerial act, although calling for the exercise of discretion, and when the law devolves upon a board or officer the exercise of a discretion, such board or officer is bound to exercise it in a sound and legal manner, and not in an arbitrary, capricious or oppressive manner. The discretion delegated to the board is a sound legal discretion, the meaning of which is well known and understood in the law, and is not an unlimited license to them to act and do as they please, irrespective of restraint, or in disregard of the rights of parties presenting bonds for their approval. *State ex rel. Attorney General v. Woodson* 41 Mo. 227. The law, by directing the board to refuse to indorse the bond with their approval, if in its judgment the sureties, or either of them, are not worth the penalty of the bond over and above exemptions, etc., imposes upon them the duty of stating wherein they consider the bond, or which of the sureties, insufficient. Common fairness requires this; but I think the law, by just and reasonable construction, requires it also.

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In *People v. Manistee County* 26 Mich. 421, this Court held that the board of supervisors were bound to distinctly record the fact that they reject the claim as not properly admissible, so as to enable the party to obtain a judicial decision whether they are bound to consider it. The present case presents a forcible illustration of the good sense of such construction of the statute. Here the relator presented his bond, duly executed, with the justification of his sureties by affidavits annexed, to the board. They first laid it upon the table, and at a subsequent meeting unanimously voted to disapprove it, without assigning any reasons for their action. They were requested by the attorney for relator to state wherein the bond was insufficient, or whether they regarded the sureties, or either of them, insufficient, but they refused to do so. This left the relator entirely in the dark, and rendered him unable to present a bond which would meet with their approval; and it was not until this Court ordered them to show cause why they did not approve relator's bond, that they gave any reason for not approving the same. The statutes of this State require a large portion of its public officers to give a bond, with sureties, and that these bonds shall be approved either by certain designated officers or boards before they enter upon the duties of the offices to which they have been elected or appointed.

If these officers or boards, upon whom is devolved the duty of approving these bonds, by simply asserting that they disapprove them, without being obliged to state any cause or give any reason, are enabled to block the wheels of government, and because they are vested with a discretion, are beyond the reach of the process of this Court to compel the performance of ministerial duties, it is well the people should know it in order that the Legislature may supply a remedy. As well might the board of supervisors attempt to prevent the exercise, by a person duly elected, of the office of sheriff or of county treasurer, by voting capriciously and arbitrarily to disapprove the proffered bond, as for this village board to prevent the relator from exercising the business of selling liquor by refusing to approve the bond presented, if it

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complies with the statute, and the sureties are in fact sufficient.

Relator has an undoubted right to engage in the traffic of selling liquors if he complies with the law; and it is the duty of the respondents to approve a bond which complies substantially with the form of the statute, and which contains the names of sureties whom they, using a legal discretion, shall judge sufficient. I am satisfied from the petition and return, that the board did not, in this instance, use a legal discretion, but on the contrary acted capriciously and arbitrarily, and that their action affects the rights of relator, and unless he is entitled to this writ he is without remedy.

Theodore Castor v. Allegan Circuit Judge.

Appeal—Issue of execution—Mandamus

1. Mere intention to take an appeal does not preclude the prevailing party from taking out an execution.
2. Mandamus does not lie to vacate an order that was not erroneous when made, whatever has taken place since.

Mandamus. Submitted June 17. Denied June 25.

Padgham & Padgham for relator.

Cooley, C. J. The application in this case is for a mandamus to require the judge of the Allegan circuit court to recall an execution issued on a decree in chancery.

It appears by the petition and the judge's return that on June 16, 1879, Columbia H. Long filed in the circuit court for the county of Allegan, in chancery, her bill for an accounting of the partnership affairs between herself and Theodore Castor and Spencer Strong. Answer was filed to the bill and issue taken upon it, and such proceedings were afterwards had that the case was referred to a circuit court commissioner to take and state an account. The commis-

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sioner made his report, finding $520.75 due the complainant, and the defendant Castor filed exceptions. A hearing was had upon the exceptions, and on December 27, 1883, the circuit judge announced in open court his conclusion that the exceptions should be overruled, and decree entered for the amount reported due by the commissioner. The decree was drawn up by complainant's solicitor, and presented to the judge for his signature, February 16, 1884, when he signed it, but directed that it be shown to the defendant's solicitor for his examination. It was immediately shown to Mr. Padgham, who was counsel for defendants in the case, and after examining it he stated that it was in accordance with the oral announcement the judge had made of his conclusion, and the decree was then, and on the same day of the signing, placed upon record. The court was not in session at that time. Defendant's solicitor saw and examined the decree about ten days thereafter. These are the facts as found by the circuit judge.

March 14, 1884, while the testimony in the case, together with the ledger, journals, and day-books of the partnership, containing the original entries of purchases and sales, the original inventory of the stock of goods and of the stock remaining after eighteen months' business, were all in the office of the commissioner, the building in which the office was situate took fire and they were all destroyed.

March 28, 1884, complainant had his costs duly taxed. He then had the decree enrolled and took out execution, which was levied upon property of the defendant, April 17. The defendant Castor then made affidavit and moved to set aside the execution. His affidavit states that the decree in the case was rendered in vacation, "and filed with the register of this court on, to wit, the 16th day of February, 1884, which fact deponent has learned since the levy aforesaid;" that no written notice of the decree has been served by the register or by complainant's solicitor; that he is advised he has forty days from the time of notice of such decree in which to appeal from the decree; and that he is desirous of taking an appeal, and intends so to do if not prevented by the acts of com-

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plainant and his solicitors or of the sheriff. The motion was made April 24 and denied May 1, and defendant Castor then presented his petition to this Court. The prayer of the petition is that the circuit judge be required to set aside the order made by him May 1, and recall the execution. It is stated in the petition that on May 14, 1884, the petitioner filed a bond on appeal, which was duly approved.

The circuit judge could not be required to vacate the order made by him on May 1, unless it was erroneous when made; and it was not erroneous when made unless the defendant had at that time taken an appeal. The mere fact that defendant Castor intended to take an appeal did not preclude the complainant from taking an execution. The motion must therefore be denied. Whether the filing of an appeal bond May 14 was in time is a question which does not arise now, as the action of the circuit judge which was complained of was prior to that date.

The other Justices concurred.

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Henry Dalman v. Remmelt Koning.

Seduction—Evidence—Cross-examination—Impeachment—Damages.

1. Error cannot lie in an action for the seduction of a minor upon the allowance of a question to the child's mother as to her knowledge of the time when her daughter went to see a physician, especially if the answer was immaterial and not prejudicial.

2. Defendant having made an affidavit for a continuance on the ground that his son was a material witness and was absent, was asked on his own cross-examination whether his son was sworn upon the trial of a certain other suit involving the same facts and at which the son was present. *Held*, that this was legitimate cross-examination; and if answered without objection a subsequent motion to strike out the testimony was properly denied.

3. Witnesses cannot be impeached by contradiction on matters not pertinent to the issue; so *held*, of the contradiction of a victim of seduction upon matters not touching her chastity.

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4. A physician may properly testify, with his patient's consent, to the date of a visit made him by the patient and the subject of the consultation, details not being given and the date being only material to fix the time of other events.

5. Damages in an action for seduction may be as heavy where the act was with force as where it was without it.

6. In an action for seduction the victim's reputation for chastity is a question for the jury.

Error to Allegan. (Arnold, J.) June 17.—June 25.

CASE. Defendant brings error. Affirmed.

Padgham & Padgham for appellant.

N. A. Earle and *P. A. Latta* for appellee. The use of force is no defense to an action for seduction: *Kennedy v. Shea* 110 Mass. 147; *Russell v. Chambers* 31 Minn. 54; 3 Suth. Damages 742; *Furman v. Applegate* 3 Zab. 28; *Leucker v. Steileu* 89 Ill. 545.

CAMPBELL, J. Plaintiff, as father of Johannah Dalman, a minor, sued defendant for debauching his daughter. She testified to a case involving force but not to such an extent as to make out rape. Defendant denied any intercourse whatever, so that the matter rested on her testimony, as contradicted by his, with the usual amount of circumstantial evidence. Plaintiff recovered a verdict.

Several assignments of error relate to admission or exclusion of testimony. A question put to Mrs. Dalman as to her knowledge of the time when her daughter went to see a physician, brought out no facts whatever of any account. The question was not objectionable, and the answer was entirely immaterial, and in no way prejudicial.

Defendant had made an affidavit for continuance in which he set out that his son, who was absent, was a very material witness on the principal issue, and stated what he could prove by him. Plaintiff's counsel admitted that if present he would swear as stated, and the case was brought on for hearing. While defendant was on the stand as a witness, reference being had to the trial of a libel suit in which the same

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facts were in issue as in this cause, he was asked on cross-examination whether his son was present at that trial, and he said he was. He was then asked whether the son was sworn as a witness, and he said he was not. No objection was made to answering these questions, but subsequently a motion was made to strike out the testimony, and it was denied. We think this was legitimate cross-examination, and it was not improper to consider it with reference to defendant's producing a witness whom, although known, he had failed to use before. It did not go beyond legitimate latitude in cross-examination, and having been given without demur, it was proper to retain it.

Johannah had been asked on cross-examination whether at a time named she and some other persons named did not go out near the railroad, and answered in the negative. One of them was asked a question concerning the same fact, to contradict her. The plaintiff objected unless they proposed to show improper conduct, and offered to allow any testimony of improprieties to be received which they chose to put in, but objected to immaterial testimony. This objection was properly sustained as a witness cannot be impeached by contradiction on matters not pertinent to the issue.

The same rule applies to rejected offers to contradict her concerning the reason of her leaving Mr. Bixby's where she had been employed. Bixby's testimony negatived any unchaste conduct on her part, and any other reason was not material.

We can see no reason why, with Johannah's consent it was not competent for her physician to give the date of a visit she made him and the subject of the consultation. He gave no details, and the date was only material to fix the time of certain other events. Beyond this the testimony proved nothing whatever.

The other exceptions refer to rulings before the jury. We do not think there is any legal foundation for the claim that the defendant could be held to any less responsibility for forcible wrong than for seduction without force. The outrage is quite as great, and the mischief quite as offensive. As

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this question has been passed upon in this Court, we need not discuss it further. See *Johnston v. Disbrow* 47 Mich. 59. We think the court charged fully and clearly on the effect which unchastity of the woman should have in determining plaintiff's right to damages. We do not think the court could have lawfully charged the jury to find that her reputation for chastity was bad. The jury were properly instructed to consider that matter, and they must have come to a different conclusion.

Several assignments relate to the charge concerning damages. It followed very closely the rules laid down in our own decisions concerning such damages as rest chiefly in the good sense and discretion of a jury for those injuries to the sensibilities which are incapable of being reduced to an exact standard. We can see no good to be gained from over-nice definitions and distinctions as to what such damages should be called. So long as the court gives cautions adequate to prevent juries from going astray into extravagant findings, there is usually no practical difficulty. In this case the charge was careful and discriminating and we can find nothing in it which goes beyond what has been heretofore approved. The damages [$1200] are not extravagant, and the rulings were proper.

The judgment must be affirmed.

The other Justices concurred.

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REUBEN C. CLARK v. STEPHEN WILES AND THOMAS WILES.

Res judicata—Reserved points—Special damages—Trespass by throwing dirt on adjoining land.

1. A decree in equity sustaining the validity of drain proceedings is conclusive upon that point in an action at law involving the same question.

2. Objections to the validity of proceedings involved in a suit cannot be raised in a later case if purposely withheld or reserved in the first one.

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3. Where special damages are claimed and the case is submitted under such instructions as would require the jury to return a verdict therefor if there were any, a verdict for defendant determines that none were suffered.

4. Persons whose duty it is to run a drain must keep within the limits of the land taken for the purpose; if they throw out dirt upon adjacent land, it is a trespass.

5. Costs were denied on granting a new trial where it appeared that much of the litigation had been unnecessary and needlessly expensive, and it was doubtful if substantial injury had been done.

Error to Genesee. (Newton, J.) June 18.—June 25.

TRESPASS. Plaintiff brings error. Reversed.

W. A. Clark and *Wm. H. Sweet* for appellant.

Long & Gold for appellees.

COOLEY, C. J. This suit was begun in justice's court, and removed to the circuit court on plea of title. The action was trespass to lands, and the question chiefly contested was the validity of certain proceedings in laying out a certain drain through the plaintiff's lands. But the same proceedings were in issue in the case of *Clark v. Teller* 50 Mich. 618, which was a suit in equity to test them. The proceedings were sustained in that suit, and the decision must be accepted as final. It was the business of complainant to bring forward all his objections then; if he reserved any for another suit they cannot now be heard.

There is, however, a further question presented by this record. The plaintiff claims that in various ways the defendants, who were the parties who cut the drain, caused him special damages; and the judge submitted the case to the jury under instructions which would have required them to return a verdict for the plaintiff for any such special damages, if they found there were any. The jury having returned a verdict for the defendants, must be understood to have determined that no such damages were suffered.

But the plaintiff claimed further that the defendants in cutting the ditch threw the earth over the limits of the land

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appropriated for the purpose upon the plaintiff's land; and one of the questions made on the trial was whether, if the fact was so, the plaintiff was not entitled to recover in any event at least nominal damages. The trial judge thought not, unless it was done in an improper, reckless or negligent manner; and he so instructed the jury. In this he erred. It was the duty of the defendants to keep within the limits of the land which had been given, purchased or condemned for the purposes of the drain; and the throwing of earth upon the plaintiff's land outside those limits was a trespass. For this error the judgment must be reversed, and a new trial ordered.

But as an inspection of this record in connection with the verdict leads us to the conclusion that much of this litigation has been unnecessary and needlessly expensive, and that it is doubtful if any substantial damages have been sustained, we think it proper, in awarding a new trial, to give to neither party costs of this Court. The costs in the court below will of course abide the result.

The other Justices concurred.

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In the Matter of Max Munck's Estate. Henry F. Lyster's Appeal.

Guardianship—Appeal from discharge of guardian.

1. Guardianship cannot be revived after the release of the ward merely to enable a claim that had been previously filed to be prosecuted against the ward's estate, or to be secured by the guardian's bond. And the claimant has no such interest in the estate as will entitle him to appeal from the order discharging the guardian.

2. Courts cannot create liens, but can only declare and enforce them.

Certiorari to Wayne Circuit Court. June 18.—June 25.

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Appeal from probate order discharging guardian. The guardian brings certiorari. Reversed, and appeal dismissed.

Oscar M. Springer, the guardian in person, for plaintiff in certiorari. The remedy for those who furnish necessaries to minors under guardianship, holding property, is against the estate in the hands of the guardian; but not against the guardian personally, unless he enters into a contract on which he can be held liable individually: *Spring v. Woodworth* 4 Allen 326; *Conant v. Kendall* 21 Pick. 36; *Cole v. Eaton* 8 Cush. 587; in legal procedure generally, when guardianship intervenes, the law regards the ward and not his guardian: *Raymond v. Sawyer* 37 Me. 406; *Thacher v. Dinsmore* 5 Mass. 301; *Brown v. Chase* 4 Mass. 436; citing the guardian to show cause is a proceeding against him personally: *Kinney v. Harrett* 46 Mich. 87; *Rollins v. Marsh* 128 Mass. 116; none but a person "aggrieved" has a right to appeal from an order of the probate court: How. Stat. § 6779; *Besancon v. Brownson* 39 Mich. 393; if the order does not "conclude, or in any way affect the rights" of the defendant, he is not "aggrieved:" *Lewis v. Bolitho* 6 Gray 138; *Labar v. Nicholas* 23 Mich. 310; *Smith v. Bradstreet* 16 Pick. 264.

Trowbridge & Brewster for respondent, as to the responsibility of the guardian to the ward's creditors, cited *Thacher v. Dinsmore* 5 Mass. 299; *Raymond v. Sawyer* 37 Me. 406; *Homstead v. Loomis* 53 Me. 549; Gary's Probate Laws, § 802, n. 73; *Conant v. Kendall*, 21 Pick. 36; *Cole v. Eaton* 8 Cush. 587, 588; *Brasher v. Van Cortlandt* 2 Johns. Ch. 242; *Thompson v. Boardman* 1 Vt. 367.

SHERWOOD, J. The appellant below and defendant in error in this case is a physician, and amputated a limb for Munck, rendering a bill for the service at the sum of $102, which he sought to have allowed him in this proceeding.

The defendant Munck, during his sickness, was adjudged incompetent, and was placed under guardianship by the probate court of Wayne county. January 18, 1883, the doctor filed his petition asking the allowance of said claim against Munck's estate, and cited the guardian to show cause why it should not be paid; and pending this proceeding, Munck filed a petition praying to be re-examined and released from

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guardianship. Accordingly, February 6, 1883, an order was entered by the probate court releasing him from guardianship, and declaring him competent to have the care and management of his own estate. Thereupon the guardian settled his account with Munck and paid over and delivered all moneys, goods and effects, held by virtue of the guardianship, to him, and filed a receipt, showing the same in the probate court, whereupon the court entered a second order discharging the guardian from liability, and canceling his bond. From this last-named order the doctor appealed to the circuit court. The circuit judge reversed the order appealed from, and entered an order directing the probate court to allow the plaintiff to prove his claim; and the case is now before us on certiorari to the circuit.

It is the duty of every guardian to manage and dispose of his ward's estate in such manner as shall be for the ward's best interest; to pay "all just debts" due from the ward "upon the approval of the judge of probate;" to "demand, sue for and receive all debts due the ward, and at the expiration of his trust, to settle his account with the judge of probate, or with the ward or his legal representative," and then "to pay over and deliver all the estate and effects remaining in his hands, or due from him on such settlement to the person or persons who shall be lawfully entitled thereto." How. Stat. § 6309. If a guardian neglects his duty, an action may be brought on his bond, which is the same whether the ward is an incompetent or an infant. How. Stat. § 6331. The relation of guardian and ward usually exists for merely temporary purposes, and it is plain that when these purposes are fulfilled the trust must terminate. Schouler on Dom. Rel. (2d ed.) 453. And when the guardian is legally discharged, he has no longer the management of the trust estate. How. Stat. § 6316.

By this appeal it was not sought to show Munck was incompetent,—unable to transact his business,—or that any fraud, mismanagement or undue influence had been practiced upon the ward by his guardian or by anybody else. But the appellant insists that his claim (which is not shown to have

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originated during the ward's incompetency) was presented to the judge of probate for allowance during his ward's incompetency, and therefore the guardianship should continue, and the property of Munck be controlled for the benefit of the claimant by the guardian until the claim should be investigated and allowed by the judge of probate, and paid, notwithstanding the guardianship was terminated and the guardian had settled with his ward and held his receipt in full, and had no funds in his hands belonging to the ward, and that the guardian and his bondsmen should be held liable to the claimant for the funds of the ward to the extent of his claim until payment thereof should be made. This we think cannot be done. It would be subjecting the ward to an arbitrary exercise of power over his property very humiliating to him, and would create a duty and liability on the part of the guardian never contemplated by the Legislature, and intolerable under our Constitution and laws.

This Court can never sanction such an exercise of authority under such circumstances, at the instance of a creditor, over the property of a debtor who is capable of managing his own estate, when the debt is an implied assumpsit and not in judgment.

On the removal of the guardian in this case all the remedies which the law gave the creditor to make his claim against the debtor or his property were open to him, and to add the new one now claimed by the appellant, would be not only without any authority in law but might deprive the debtor of his own right and mode of defense, were the claim an unjust one.

The only object of the appeal in this case was to secure an order from the probate court to the guardian to withhold the funds of his ward for the purpose of satisfying the appellant's claim when established. It is difficult to see how this could be done, even though the authority existed for so doing, so long as the guardian had, by the order of the judge of probate, been discharged and settled with his ward, and no appeal had been taken from that order.

Neither the guardian nor the property of his ward can be

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made liable under such circumstances. He had not only been discharged by valid order but had settled with his ward, and paid him all he owed him, and this he had a legal right to do. *Hooper v. Hooper* 26 Mich. 435. We are unable to see upon what principle the incompetency of the claimant's patient in this case gave him an additional lien upon his debtor's property to what he would have had, had the patient remained compos mentis. Courts cannot create liens. They can only declare and enforce them when they exist, either in law or equity.

The claimant had no such interest in the estate or property of his patient in this case as would authorize him to take the appeal.

The judgment at the circuit must be reversed, and the appeal dismissed with costs of both courts.

The other Justices concurred.

SIEGFRIED HIGHSTONE v. MARY ANN BURDETTE, LOUIS MARTIN AND ANGELIQUE MARTIN.

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Ejectment between co-tenants—Burden of proving ouster.

1. Ouster is a question of fact in an action of ejectment, and the burden of proving it is on the party who alleges it.

2. In ejectment between grantees of tenants-in-common defendant claimed title by adverse possession, and asserted that his entry under a warranty deed was an ouster of the co-tenants. There was evidence to show, however, that he only bargained for an undivided interest, and there was nothing to show that the co-tenants knew of his possession or claim of title. *Held*, for the jury to determine whether he entered claiming title to the whole, and intending to oust his co-tenants.

3. Where the parties in ejectment, being co-tenants, rely upon an ouster, and the defendant claims title by adverse possession, the plaintiff has the burden of showing that he was ousted within the period of the statute of limitations, and the defendant of showing that he had ousted the adverse claimant so long before that the period of limitation had run since.

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Error to Mackinac. (Steeres, J.) June 18.—June 25.

EJECTMENT. Plaintiff brings error. Reversed.

James J. Brown and *C. R. Brown* for appellant, as to a presumption of ouster, cited *Woolsey v. Morss* 19 Hun 273; *Riggs v. Fuller* 54 Ala. 141; *Horne v. Howell* 46 Ga. 9; *Kinney v. Slattery* 51 Ia. 354; *Bradstreet v. Huntington* 5 Pet. 448; *Ricard v. Williams* 7 Wh. 60; *Prescott v. Nevers* 4 Mas. 330; *Alexander v. Kennedy* 19 Tex. 488; *Livingston v. Peru Iron Co.* 9 Wend. 511; *Campau v. Lafferty* 43 Mich. 429; *Foulke v. Bond* 41 N. J. 542; *Saxton v. Hunt* 20 N. J. 493; *Hodgdon v. Shannon* 44 N. H. 572; *Pitts v. Wilder* 1 N. Y. 525; *Holley v. Hawley* 39 Vt. 532; *Culver v. Rhodes* 87 N. Y. 348; *Roberts Admr. v. Morgan* 30 Vt. 324. Possession by one tenant-in-common, unless exclusive, will not affect a co-tenant: *Campau v. Campau* 44 Mich. 31.

Humphrey & Perkins for appellee, as to ouster, cited *Wright v. Saddler* 20 N. Y. 320; *Campau v. Dubois* 39 Mich. 280; *Sands v. Davis* 40 Mich. 14; *Bailey v. Bailey* 36 Mich. 183: *Bray v. Bray* 30 Mich. 480; *Ewing v. Burnet* 11 Pet. 41; *Sydnor v. Palmer* 29 Wis. 226; *Stevens v. Brooks* 24 Wis. 326; *Jackson v. Smith*, 13 Johns. 406.

CHAMPLIN, J. Under an Act of Congress entitled "An act to confirm certain claims to lands in the territory of Michigan,"[1] the heirs of Francis [Clairmon] Claremont were confirmed in their claim "to the tract of land containing seventy-eight acres and ninety one-hundredths of an acre, bounded northwardly by lot numbered eleven, eastwardly by Lake Huron, southwardly by lot numbered nine, and westwardly by the public lands; and being designated on the connected map of private claims at Michilimackinac as 'lot numbered ten, at Point St. Ignace.'" A patent was issued by the United States to the heirs of Francis Claremont, and to their heirs and assigns, forever, on the 12th day of October, 1830. The heirs of Francis Claremont consisted of four sons, named John, Francis, Louis and Alexander. The plaintiff claims an undivided half of the above land in fee,

[1]Act of April 17, 1828.

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and has brought this suit in ejectment to establish his title and obtain possession. His chain of title is as follows: 1st, the patent above mentioned; 2d, a warranty deed from Louis Claremont and Mary Claremont, of Hamburgh, county of Fremont and state of Iowa, to Siegfried Highstone, of "all their right, title and interest" to the land in question, dated October 7, 1874; 3d, a deed of the land in question from Francis Claremont, Sr., of Richfield, Summit county, Ohio, to Siegfried Highstone, dated September 2, 1874.

The defendants claim title through the same patent, and a deed from John Claremont and Rebecca Claremont to Louis Martin, dated July 8, 1854. This is a full covenant warranty deed of all the land, under which defendant entered into possession in 1866. May 1, 1867, Louis Martin conveyed the whole of the premises in question by warranty deed to his wife, Angelique Martin. April 6, 1878, Angelique Martin, by warranty deed, conveyed the whole of the premises to Mary Ann Burdette. April 21, 1881, Louis and Angelique Martin conveyed all of the premises to Mary Ann Burdette.

On the trial of the case in the court below it was conceded by the plaintiff "that the defendants, having entered upon said land in 1866, have been in the sole and peaceable possession thereof up to the present time;" but denied that the possession was acquiesced in by the plaintiff.

The rulings complained of consist in admitting and excluding testimony against plaintiff's objections, and in taking the case from the jury and directing a verdict for defendant. The defendant claimed title to the whole premises by adverse possession, and entry under color of title derived from John Claremont in 1854; that at the time this deed was executed the land was wild and uncultivated, and so remained when he took possession in 1866; and that such possession taken under a warranty deed was an ouster of his co-tenants, and the statute of limitations commenced to run from that time.

There was no evidence in the case that the co-tenants through whom plaintiffs claim had any notice or knowledge of Martin's taking possession, or of any claim by him

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adverse to their title. There was testimony tending to prove that Martin only bargained for and purchased from John Claremont his undivided one-fourth interest in the land. Under the proofs in this case the question ought to have been submitted to the jury as to whether Louis Martin entered into possession of the lands in question, claiming title to the whole, and with intention of ousting his co-tenants.

In order to maintain ejectment the plaintiff was required to prove, in addition to all other evidence which he was bound to give, that the defendants actually ousted him, or did some other act amounting to a total denial of his right as such co-tenant. How. Stat. § 7812. The plaintiff gave evidence tending to prove that he demanded of Mary Ann Burdette to be let into possession with her in 1878, and that she refused and claimed that she owned the whole land, and was in possession and should keep it; and she refused to divide the property with him. Ouster is a question of fact which it is the province of the jury to determine, and the facts and circumstances which went to establish the ouster, ought under proper instructions from the court to have been submitted to the jury. *Taylor v. Hill* 10 Leigh 457; *Cummings v. Wyman* 10 Mass. 465; *Purcell v. Wilson* 4 Grat. 16; *Harmon v. James* 7 Sm. & M. 111; *Blackmore v. Gregg* 2 W. & S. 182; *Carpentier v. Mendenhall* 28 Cal. 484; *Clark v. Crego* 47 Barb. 599. And the burden of proof rests upon the party alleging it. *Newell v. Woodruff* 30 Conn. 492; *Van Bibber v. Ferdinand* 17 Md. 436.

In this case both parties relied upon ouster, and it was incumbent upon the plaintiff to prove it within the statute of limitations, and if he introduced evidence tending to prove it within that period, then the burden was shifted upon the defendants to prove an actual ouster which occurred anterior to that period. But the circuit judge did not permit any of the testimony to go to the jury, and directed them to render a verdict for the defendants. This was erroneous.

The judgment is reversed and new trial granted.

The other Justices concurred.

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GEORGE GARTNER v. JACOB BELLER.

Bill rendered no evidence of value.

A lawyer sued his client for the balance of his bill, and put in testimony as to the value of his services. Defendant produced a bill rendered. *Held* proper to charge the jury that defendant had given no evidence of value, and that if they were satisfied with the testimony given they might base their verdict on it.

Error to Wayne. (Chambers, J.) June 18.—June 25.

ASSUMPSIT. Defendant brings error. Affirmed.

Geo. H. Prentis for appellant.

Fred A. Baker for appellee.

CAMPBELL, J. Plaintiff sued defendant for a balance due for professional services. He described the services and gave his own testimony as to their value. He also swore other witnesses who gave evidence on what we think was fairly within the same theory, and who substantially agreed with him. The defendant gave testimony as to the services rendered, but put in no proof of value, but did introduce a bill rendered on which part payment had been made.

The court below called the attention of the jury to the fact that no evidence of value had been given by defendant, and instructed the jury in substance that they might use the testimony given as a ground for basing a verdict upon, if they were satisfied with it, and they so found.

We can find no reasonable ground for objection to any of the rulings below, which seem to us entirely proper, and the only ones which could have been given. There is nothing worthy of discussion.

The judgment must be affirmed.

The other Justices concurred.

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The People v. James Carroll.

Burglary—Possession of stolen goods.

Possession of stolen goods may be shown, in connection with other evidence, upon a prosecution for burglary.

Exceptions from the Superior Court of Grand Rapids. (Parrish, J.) June 19.—June 25.

Burglary. Respondent was convicted below. Affirmed.

Attorney General *Van Riper* for the People. "Possession alone, unsupported by other facts indicative of guilt, would not be prima facie evidence of burglary, but when taken and considered with other evidence in the case, it might be sufficient:" *Stuart v. People* 42 Mich. 261.

Emil A. Dapper for respondent.

Sherwood, J. The respondent was convicted of burglary and larceny in the Superior Court at Grand Rapids. The record contains a bill of exceptions but does not purport to give all the testimony.

On the trial, the counsel for the People gave testimony tending to show that the money stolen was found upon the person of the respondent. This was objected to by the respondent's counsel, on the ground that possession of stolen property was not evidence of burglary. The testimony was admitted in the case, and exception was taken. It was proper testimony to be given with other evidence in the case, to prove the respondent guilty of the crime charged, and no error was committed in receiving it. It is only necessary to say further, that the other objections and exceptions of counsel for respondent were not well taken, and need not be further considered.

The judgment must be affirmed.

The other Justices concurred.

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ROBERT HOUGHTON v. JAMES G. ROSS.

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Sale—Transfer of title—Receipt as account stated.

1. H and W were employed in a lumber business and W went to Canada for teams. H owned a span of gray mares, which he asked W to bring when he returned. W found the expense of bringing them too great and sold them, but told H, on returning, that he had a team of black ponies that would suit him. He did not say, however, that he had traded the grays for the blacks. *Held*, that without some agreement of sale, carried out by payment of price or earnest money or by delivery, there was not enough in the evidence to show a transfer to H of the title to the ponies.

2. A receipt which states its purpose to be for a complete settlement, and which covers the whole period of dealing, is equivalent to an account stated; and though it is open to explanation as to errors or omissions, it cannot be treated as if it had not been meant to cover everything.

Error to Marquette. (Grant, J.) June 19.—June 25.

ASSUMPSIT. Defendant brings error. Reversed.

F. O. Clark for appellant.

E. J. Mapes for appellee.

CAMPBELL, J. In this case Houghton sued Ross for the use of two teams which Ross bought of Gordon & Co., but which plaintiff claimed as his own. One was a team of black ponies which plaintiff insisted were given him for a pair of gray mares disposed of in Canada for a much less sum than the ponies were worth. The other team he claimed to have bought from a vessel. As it was intimated on the hearing that this second team had been put out of the case by a reduction of the verdict, we need not look beyond so much of the record as refers to the others.

In this, as in the replevin case, plaintiff's testimony about the bargain is all that is most important on his side, although there was some other testimony. It appears here as there

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that while plaintiff was employed by Gordon & Co. in their lumber business in Schoolcraft county, under Mr. Weller, as their general agent, he desired Weller, who was going down to Canada after teams, to bring up a team of gray mares which plaintiff had owned for several years. Weller, instead of bringing them up, sold them as not worth bringing at the rates of freight and duties which would be payable. He did this without any previous authority. He bought thirteen or fourteen teams and had them taken up. About a month after his return plaintiff saw him and he told him of the sale. Plaintiff says that he told him he had a nice young team that would satisfy him, but did not say he had traded the grays for the blacks, but afterwards pointed out the blacks as plaintiff's team. According to plaintiff's testimony he had more or less teams under his orders, but these horses, although brought up in October, did not come to his camp until the next March, and did not come into his personal possession for some time thereafter.

The teams having been sold by Gordon & Co. to Ross, and used in Ross's business, plaintiff sues for their use. There is considerable testimony which is in conflict. Among other things there was a receipt in full of all demands given to Ross by plaintiff, covering the use of a team not including those now in dispute, but not covering these.

We find no testimony which can be relied on as distinctly showing a sale and delivery of these horses to plaintiff. As he is the only person who swears to any such bargain at all, and who swears to what was done, it cannot be supposed that he has left out any important element. He shows that there was no authority to sell the grays, and that he was not given to understand the grays were exchanged for the blacks. This being so, there could have been no transfer of title without some agreement of sale carried out by payment of price or earnest, or by delivery. It is very difficult to make out any such transaction.

When plaintiff receipted to Ross, it was for the purpose of a complete settlement, and the receipt so states. It was made at the end of his term of service. It covered the

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whole time of his employment with Ross. It covered a charge for one team, and it gave credit for all moneys received.

This being so, the charge was not correct in regard to its effect. It is undoubtedly true that a receipt may be explained and mistakes corrected under proper circumstances. But the court put the case to the jury on the theory that if it was not understood by the parties to be a settlement in full, if no reference was made to the use of these horses during this time, and the settlement was not made with reference to that, then of course it would not cover pay for the horses, but would only cover the account it purports to cover.

This statement and the receipt attached to it cannot bear any construction except that of an account stated. It is in such a shape as to exclude the idea that it does not mean to cover everything. It is entitled to all the respect due to an account stated, and while open to any explanation which can be properly allowed for errors or omissions, it certainly implies on its face not merely that it was intended to cover what is detailed, but also that there is nothing outstanding which is not detailed. Perhaps this may have been what the court understood, but the language used leads to a different impression, and the difference is quite material, and as the testimony stood, was very well calculated to lead to a wrong conclusion.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

JAMES G. ROSS v. ROBERT HOUGHTON.

Replevin—Instructions raising unwarrantable inferences.

A lumberman's employee asked the foreman to bring a span of gray mares which he owned, from a distant point, but the foreman sold them, and on his return indicated a span of French ponies which he

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had brought with him and which he thought would be satisfactory in place of the mares. It did not appear, however, that the mares had been exchanged for the ponies. The lumberman afterwards sold out and the ponies were included in the sale. The employes took possession of them and the purchaser sued him in replevin. The foreman, who was not employed by the purchaser, was a witness for the plaintiff, and was cross-examined as to whether he had not evaded a settlement with the owner of the mares. *Held*, error to so charge the jury as to leave them to infer that the foreman was the purchaser's agent, and that the purchaser was interested in the attempt at a settlement and was involved in any trickery connected therewith.

Error to Marquette. (Grant, J.) June 19.—June 25.

REPLEVIN. Plaintiff brings error. Reversed.

F. O. Clark for appellant.

E. J. Mapes for appellee.

CAMPBELL, J. This case was presented with another involving title to the same property, but in a way so far different as to require a separate discussion.

This action is replevin for a pair of black French ponies claimed by defendant as his. They were sold plaintiff by the firm of Gordon & Co., who were his predecessors and assignors in the lumbering business in Schoolcraft county. They were bought for Gordon & Co. by Mr. Weller, who was their general agent, and brought up by him from Canada in the summer of 1880 with thirteen or fourteen other teams. Defendant's claim is that when Weller went east that summer, defendant asked him to bring up a team of gray mares that defendant had owned for several years, and that instead of doing this Weller sold them and these ponies were given him instead.

The testimony seems to indicate that these grays were held in Canada under a chattel mortgage which Mr. Gordon redeemed, and that it was not thought worth while from their age and condition to take them to Lake Superior, and pay freight and duties, and so Weller sold them. There is no testimony tending to show that they were exchanged for

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the black ponies, and defendant does not claim he so understood. But he does claim that Weller told him he should have these in lieu of them, although apparently more valuable.

The issue, therefore, was simply whether Gordon & Co. sold or gave these ponies to Houghton to make up for the gray mares.

While it is difficult to see satisfactory evidence of the transfer, which would comply with the statute of frauds, that specific point is not made on this record. But it is claimed that on the conflicting state of the testimony concerning what is claimed to have been a sale, effect was allowed to certain evidence which was prejudicial and irrelevant.

It appears that Weller who was in general charge for the Gordons, was not general agent for Ross, who was represented in that office by Mr. Conelly, to whom this property was turned out by Gordon & Co. Among other inquiries one naturally arose as to how the accounts stood between Houghton and Gordon & Co., especially as bearing on dealings connected with the horses, which had been employed more or less in such a way as would be consistent with defendant's ownership, though not necessarily indicating it.

Defendant's counsel was allowed on cross-examination of Weller to show that he attempted to get a settlement with defendant of his account with Gordon & Co., and that some months before Houghton had seized the ponies out of the field where they were pastured, the book-keeper had been told to credit him with $60, as the price brought by the mares. After being asked about this last attempt at settlement, defendant's counsel were allowed under objection to ask whether Weller had not, after this suit was begun, repeatedly agreed and then avoided to meet Houghton for a settlement. The court ruled that anything which showed he did not try to get a settlement was material. In his charge the judge spoke of Weller as agent not only for Gordon & Co. but also for Ross, which last was not admitted, if there was anything tending to prove it. He also spoke of this attempted settlement as not binding on Ross & Co.

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unless cognizant of it, and that an attempt at a settlement pending the suit would not have much force.

But the rulings together left the jury at liberty to infer that Ross might in some way be interested in Weller's attempts to settle with Houghton, and the evident purpose of urging Weller with questions looking towards previous evasions of settlement, must have been to lead to an idea that there was some trickery resorted to for the purpose of affecting this controversy. Calling this material, and speaking of Weller as Ross's agent, could hardly help inducing the jury to connect transactions which had nothing to do with each other. If Gordon & Co. sold the team to defendant, the sale could not be affected by subsequent accountings. And if they did not sell it to defendant, then Ross's title could not be affected by the subsequent sayings or doings of Gordon or Weller. The conclusions of the jury were so peculiar, when compared with all the proofs, that we think it evident they became confused about the relations of the various parties. At all events there was room for it under the rulings.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

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Rhoda S. Curtis v. Walter E. Campbell and Allen Nowlin.

Administrator's sale of land—Adverse possession.

1. A purchaser at an administrator's sale has all the title the intestate had if the transfer was duly made by deed under a probate license to sell. How. Stat. § 6078.

2. An owner of outlots which he does not fence or cultivate may establish an adverse possession by cutting grass and timber, ditching, paying general and special taxes and openly and notoriously claiming and using the land.

Error to Wayne. (Jennison, J.) June 20.—June 25.

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TRESPASS. Plaintiff brings error. Reversed.

Moore & Moore and *S. W. Burroughs* for appellant.

Cahill, Ostrander & Baird for appellees. Occasional entries upon land for the purpose of taking off timber or grass while the person doing so lives on other lands, do not constitute adverse possession: *Safford v. Basto* 4 Mich. 406; *Clark v. Hall* 19 Mich. 376; *Yelverton v. Steele* 40 Mich. 538; *Yelverton v. Hilliard* 38 Mich. 355.

CAMPBELL, J. Plaintiff sued defendants for trespassing on lands in which they showed no right and to which her title ran back through mesne conveyances to 1852. She derived title immediately by administrator's deed from the estate of John Garlick. This sale not being drawn in question by any one claiming in privity with the estate, and having been made by license from the proper probate court, cannot be declared void, inasmuch as all was shown which is required to be shown by section 4598 of the Compiled Laws. [How. Stat. § 6078.] *Howard v. Moore* 2 Mich. 226; *Coon v. Fry* 6 Mich. 506; *Marvin v. Schelling* 12 Mich. 356. She therefore has all the title that Garlick had.

The record shows testimony undisputed, tending to prove that Garlick received a warranty deed in 1857 from one Lewis who received a warranty deed in 1852. It also shows that Garlick occupied the land from about the time of his purchase in the usual way in which outlots of land are generally occupied, by cutting timber and grass, ditching, paying general and special taxes, and openly and notoriously claiming and using it in the only way it could be used without fencing and cultivation. The case is considerably stronger as to acts and claims than *Sparrow v. Hovey* 44 Mich. 63, where such testimony was regarded as important.

We cannot see any reason why plaintiff was not entitled to recover, and the ruling that she made out no cause of action was erroneous.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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MEYER SANDLER v. TIMOTHY BRESNAHAM.

[See 53 Mich. 567.]

Sale.

The purchaser of goods had to replevy them from an officer who took them on an attachment against the vendor. The sale embraced transactions beginning Jan. 6, and closing on the 9th or 10th. The levy was made June 10. Under a charge that unless the sale was made before the levy defendant was entitled to a verdict, the jury found for plaintiff. *Held*, that it must be assumed that they found the sale to have been completed on the 9th, if such assumption were necessary to sustain the verdict.

And if the case was so submitted that the jury might have found that the sale was completed on the 6th, although the facts were not sufficient to establish it, the verdict must stand if no instruction was asked for as to the effect of what took place that day, and if no exception was taken on the specific point that the evidence was insufficient to show a completed sale at that time.

Motion for re-hearing. Denied. June 25.

Smith, Nims, Hoyt & Erwin for the motion.

Frank G. Holmes against.

COOLEY, C. J. On the trial of this case plaintiff claimed the iron under a purchase made from Snher, January 6, 1883, which was finally closed up a few days afterwards, and as Snher says, on January 9. The defendant claimed under a levy made January 10, and the court instructed the jury that unless the sale was made before this levy the defendant was entitled to their verdict. Under this instruction the plaintiff recovered. In reviewing the case it was said by this Court that the facts shown to have taken place January 6th, did not tend to make out a sale, but the transactions on the 9th were sufficient to pass the title. Application is now made for a re-hearing on the ground that the transactions which perfected the sale did not in fact take place on the 9th but on the 10th, and at an hour of that day later than the hour of the

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levy. And the attention of the Court is directed to evidence to that effect. But we do not see how it can be assumed that the sale was completed on the 10th rather than on the 9th. The testimony of Snher is positive, and under the instruction of the judge which submitted the facts to the jury under the positive requirement that they should return a verdict for the defendant, unless they found the sale to have been made before the levy, it must be assumed that they found the sale to have been perfected on the 9th, if such an assumption were essential to the support of their verdict.

But it may be said that the judge submitted the facts which occurred on the 6th to the jury, and that the plaintiff claimed that these amounted to a sale, and the jury may have concurred in this view, though this Court holds it to be erroneous. This may be true. But the defendant requested no instruction from the judge upon the effect of the transactions upon that day, and the judge expressed no opinion upon them. He told the jury that if a sale was made on that day, the plaintiff was entitled to recover; and as this proposition was unquestionably correct, the defendant, instead of excepting to it generally, should have called attention to any supposed defects in the evidence to make out a sale, and requested specific instructions. But not only was this not done, but when the judge recapitulated the facts sworn to as having taken place on the 6th, and then told the jury that they were to determine from the evidence whether prior to the 10th a sale had been made and completed, no exception was taken, and no complaint of that part of the charge made. We therefore adhere to the opinion filed in the case, and find no occasion for further discussion.

The other Justices concurred.

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Louisa E. Patterson v. John K. Patterson et al.[1]

[See 49 Mich. 176.]

Agreement for use of land—Question for jury.

Defendant in a suit for trespass upon land belonging to an estate in process of settlement, justified under an agreement which he claimed to have made with decedent's widow that he might use the land for a year or until the estate should be settled. There was evidence tending to show that it might be settled within a year. *Held*, that a charge that plaintiff could not recover if the jury should find that defendant was to have the use of the land while the estate was being administered, was erroneous; the question should have been submitted whether the arrangement was to last until, or end with, the settlement of the estate, irrespective of the time it should take to settle it.

Error to Kalamazoo. (Mills, J.) Feb. 7.—April 30.

Trespass. Plaintiff brings error. Reversed.

Edwards & Stewart for appellant.

Howard & Roos for appellee.

Champlin, J. This case comes before the Court in an essentially different aspect from what it did on the former occasion. The question then presented was whether the plaintiff and her children were entitled to a homestead right in the dwelling-house and forty acres, to the exclusion of the other heirs. This Court then held that the question was decided by *Robinson v. Baker* 47 Mich. 619, to the effect that the homestead right secured by the Constitution was an exemption provision strictly, and gave the right only as against creditors. And this Court also then held that "it does not follow that because the heirs might claim partition, they were therefore at liberty to disturb an existing possession; and in respect to actual occupancy the evidence was

[1] This case and the next should have appeared in Vol. 53, at p. 504.

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such as to make a case for the jury." It was also said that "it appears from the statement of facts above given that, while the plaintiff claimed to be in possession of the locus in quo at the time of the alleged trespass, John K. Patterson claimed on the other hand to have been in exclusive possession with the plaintiff's consent. If this claim on his part was sustained by the evidence it should have been an end of the case. But the burden to prove this was upon the defendant, and the plaintiff denied."

The record now before us discloses more fully the particulars of the defendants' claim, and the proof by which it was attempted to be established. The defendant John K. Patterson testified that on the 2d day of May, 1880, he made an agreement with the plaintiff for a division of the farm, by which he should have the west portion, being the fifteen acres now in dispute, to cultivate and crop "for one year, or during the process of the settlement of the estate." Another defendant, Martin Bacon, testifies to being present and hearing the agreement stated over, and he was asked by defendants' counsel the following question: "State what was said, if anything, with reference to the time this division should continue?" To which he answered: "It should be for one crop, or until the estate should be settled. Mr. Lillie said he supposed it would be settled within a year or before, but he would say for one crop, or until the estate was settled." John K. Patterson immediately arranged with Martin Bacon to put in a crop of corn on shares, and he did so.

The plaintiff denies that she made any such agreement as to division of the farm for cultivation, but says she consented to Mr. Patterson putting in one crop of corn, and after it was harvested she was to have the exclusive possession again. Immediately after the corn was harvested a dispute arose between the parties as to the possession of the fifteen acres, both parties seeming to act upon their respective understanding as to the agreement. Each turned their stock in the field, and each turned the other's out. In the spring of 1882 plaintiff was in possession, and had commenced plowing the ground for the purpose of sowing oats; during which

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time the defendant Bacon came with his team and also commenced plowing, and drove plaintiff's son, who was plowing for her, away. She forbade Bacon from plowing or sowing; nevertheless he continued on and put in a crop of oats. When the oats were fit to be harvested plaintiff attempted to secure the crop, but defendant Bacon prevented, and although forbidden by plaintiff, harvested and drew away the crop.

The court instructed the jury as follows: "If you find that an agreement was made between the plaintiff and John K. Patterson by which he, either for himself alone or for himself and two older sisters, was to have the use of the fifteen acres upon which the oats were grown, while the estate of William W. Patterson was being administered, plaintiff cannot recover in this case."

We think this charge of the court failed to present to the jury the law properly, as based upon the testimony in the case relative to the agreement claimed to have been made by defendants between the parties. The court should have submitted to the jury the question whether the agreement, if they found one to have been made between plaintiff and defendant Patterson in May, 1880, for the use of the fifteen acres, was by its terms or in contemplation of the parties, to terminate at the end of one year or sooner, if the estate should be sooner settled, or whether it was not to terminate until the estate was settled, if that period extended beyond one year. The evidence of the agreement introduced by the defendants was just as consistent with one hypothesis as the other, and tended more strongly to prove the former than the latter.

The law gave the administrator one year and six months to settle the estate, and no reason was shown to exist to lead the parties to suppose that a longer time would be required.

The evidence does not fix the exact time of granting letters of administration, but judging from the time of the decease of William Patterson, which is given in the stipulation of facts, six months or perhaps more had elapsed since the appointment. Considering this fact, in connection with

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the evidence of defendants Patterson and Bacon relative to the agreement, the jury would have been justified in finding that such agreement was to have terminated in one year or sooner, if the estate should have in the meantime been settled. And if they had so found, defendants would have had no right to enter and sow the crop of oats in question, and plaintiff was entitled to treat such unauthorized entry upon her possession as a trespass.

The instruction given entirely overlooked the vital point raised upon this branch of the evidence introduced by defendants to make out their justification, and for this error the judgment must be

Reversed and a new trial ordered.

COOLEY, C. J. and CAMPBELL, J. concurred.

SHERWOOD, J., having been of counsel, did not sit in the case.

M. ELLA EDWARDS v. EDWARD M. EDWARDS.

Fraud in sale of chattels—Delivery—Mortgage.

1. A sale of chattels by a debtor cannot be impeached for want of delivery if they are already under the purchaser's control, as *e. g.* where the debtor is the purchaser's son-in-law and is indebted to him, and the chattels are in a building belonging to the purchaser's wife and to which he has the key.
2. It is error to submit the question whether a bill of sale was meant as a chattel mortgage if there is no evidence tending to show it.
3. Fraud is never to be presumed but must be found.

Error to Berrien. (A. J. Smith, J.) April 10.—April 30.

TROVER. Defendant brings error. Reversed.

A. H. Potter and *Clapp & Bridgman* for appellant.

Lawrence C. Fyfe and *N. A. Hamilton* for appellee.

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SHERWOOD, J. This action is trover, brought by the plaintiff to recover for the value of a quantity of personal property consisting of knitting machinery, which she alleges was converted by the defendant, who was the father of her husband. Plea, general issue.

The deceased at the time of his death was engaged in running a knitting factory at St. Joseph, in this State. His father had previously furnished him with money to commence business in Chicago. Making a failure there he returned to St. Joseph. The son again desired to start in business in St. Joseph, and the father, to enable him to do so, purchased and gave to him five machines for that purpose. After he commenced running the business, he borrowed of his father from time to time large amounts of money to carry it on. The father took a note from the son, dated September 1, 1881, for the sum of $1588.42, it being for part of the money loaned. The machinery was operated in a building belonging to the defendant's wife. The defendant had the key to the building, and was much of the time in and about the same. On the 18th day of March, 1882, the son sold to the defendant the property mentioned in the declaration for the sum of $1561, and made a bill of sale thereof to the defendant, the amount of which was endorsed upon the note the same day. The son's books, kept by himself, were introduced in evidence, which showed that on the 9th day of May, 1881, there was due the defendant $1561.42; and it was further shown that the son borrowed of the defendant after September, 1879, at different times, moneys amounting to the sum of $1775; and further that the son, before his death, admitted that this amount did not cover the sums the defendant had lent him. These facts were not controverted. Under the charge of the court the plaintiff had judgment for the sum of $1207, and the defendant brings error.

The only exceptions are to the charge of the court. On the part of the plaintiff it was contended that the sale of the property in question from the son to the father was void, because—*first*, there was no valid consideration for the bill

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of sale; *second*, the bill of sale constituted a preference which the son, being insolvent at the time, could not make legally.

It is unnecessary to consider the second point, as the circuit judge sustained the position of defendant's counsel taken in his request to charge upon that subject.

Upon the first point we have examined the record carefully, and fail to discover any fraud of any kind committed by either the father or the son in the transaction complained of. The plaintiff was not a creditor of her husband; neither had she, as disclosed by the record, any separate property of her own. When the father had received the property mentioned in the plaintiff's declaration the son was still owing him considerable amounts of money, aside from what the father had given him. When the bill of sale was made, all the possession which could be delivered of the property by the vendor was taken by the vendee; in fact it was in the building of the defendant's wife and of which the defendant had control, he holding the keys to the same. Certainly the case cannot be made to fall within the Statute of Frauds, referred to by counsel for plaintiff. This is the only ground relied on for recovery.

Fraud will not be presumed but must be found. It is true that when certain facts are found to exist, the law will prima facie deem the transaction fraudulent; but we do not find them in the evidence in this case.

The circuit judge submitted the case to the jury upon the theory that testimony had been given tending to prove such facts. Under this theory the circuit judge submitted to the jury the question whether or not the bill of sale was intended as security or a sale absolute. This should not have been done. There was no evidence in the case tending to show the bill of sale was intended as security. The transfer of the note by defendant to his wife, and the retransfer to him, was of no materiality in the case. The real consideration for the note and for the bill of sale was substantially undisputed, and the case does not show any fraud or intention to defraud,

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or evidence tending in that direction; and such being the fact the case should not have been submitted to the jury.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

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The State Tax-Law Cases.

Tax law of 1882—Constitutional principles—Participation of outsiders in legislation—Notice to non-resident land-owners—Res judicata.

1. The constitutionality of the General Tax-law of 1882 was questioned in the circuit courts for the counties of Marquette and Wayne. In one it was sustained and in the other denied. Upon review the Supreme Court was equally divided in each case, so that neither judgment was disturbed.
2. Whether legislation is invalidated by the participation of outsiders in the discussions of the Legislature—Q.
3. Whether the lands of resident-owners can be sold for taxes upon merely constructive notice to them by publication—Q.

   Whether the statutory affirmance of a judgment on the equal division of the Supreme Court fixes the rule of law for any case but that which is under review—Q.

[State of Michigan v. Iron Cliffs Company.]

Appeal from Marquette. (Grant, J.) April 18.—Sept. 23.

Petition for tax-sale. Defendant appeals. Affirmed.

W. P. Healy for appellant. Legislative power cannot be delegated: *People v. Collins* 3 Mich. 343; *Parker v. Com.* 6 Penn. St. 514; *Thorne v. Cramer* 15 Barb. 115; *Barto v. Himrod* 8 N. Y. 491; *Exp. Wall* 48 Cal. 315; trial of adverse titles to land cannot be had in equity: *Blackwood v. Van Vleet* 11 Mich. 252; *Tabor v. Cook* 15 Mich. 325; Sedg. Const. Law 489 *n.*

Attorney General *Jacob J. Van Riper* for the State. Personal notice to resident or non-resident owners of lands,

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in tax proceedings, is not a constitutional privilege, but is regulated by the law-making power of the State: *Sears v. Cottrell* 5 Mich. 251; Cooley on Taxation 334; *New Orleans v. Cordeviolle* 10 La. Ann. 732; *New Orleans Draining Co. Case* 11 La. Ann. 338; *Cuttle v. Brockway* 32 Penn. St. 45; as to the powers of the Legislature in the levy and collection of taxes, see *Hagar v. Supervisors* 47 Cal. 222, 233; *People v. Mayor of Brooklyn* 4 Comst. 419; *Murray's Lessees v. Hoboken Land Co.* 18 How. 272; to pursue every delinquent liable to pay taxes through the forms of process and a jury trial would materially impede, if not wholly obstruct the collection of the revenue: *Cowles v. Brittain* 2 Hawks 204; the Legislature can provide for levying and collecting taxes without a common-law trial: *Weimer v. Bunbury* 30 Mich. 202; *Doe v. Deavors* 11 Geo. 79, 86; *Harris v. Wood* 6 T. B. Monroe 641; *Harper v. Com.* 23 Geo. 566; *State v. Allen* 2 McCord 55; *High v. Shoemaker* 22 Cal. 363; *Bank of Columbia v. Okely* 4 Wheat. 235; the Supreme Court cannot take jurisdiction of chancery appeals unless permitted by statute: *Maxfield v. Freeman* 39 Mich. 64; *Weed v. Lyon* Walk. Ch. 77; *Cady v. Knit Goods Mfg Co.* 48 Mich. 133; *Mich. Ins. Co. v. Whittemore* 12 Mich. 311.

Cooley, C. J. Prior to the year 1881 the practical operation of the revenue laws of the State had for some years been growing more and more unsatisfactory to the State authorities. To explain this it will be necessary to give a brief outline of the tax system. Taxes were apportioned according to a valuation of property made by local assessors. Local levies were voted by local boards, and the general taxes to be raised for State purposes were added to these, and a warrant issued to a local officer for their collection. This officer, if he was unable to collect any tax levied upon real property, made a return of the fact, and the parcels returned were advertised and sold at a public sale, subject to one year's redemption. The sale was made to the bidder who would pay the tax for the smallest portion of the land, and if no redemption was made the purchaser received a deed from the State which purported to convey a fee-simple title, and did so in fact if the proceedings were all legal. This effect of the deed it was supposed would make owners careful that a sale should not become absolute, and the State would get its

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revenues in due season. The State, therefore, when lands were returned to it for unpaid taxes, assumed that portion of them which belonged to the municipalities, and carried the burden until the time of the annual sale. If for any parcel of land no bid was then made, the land was struck off to the State, and the State took the risk of being able to sell it for the amount of the taxes afterwards.

The system in theory seemed a good one, but serious difficulties were encountered in its administration. One of the chief of these was that very many parcels of land remained unsold in the hands of the State, and the taxes accumulated against them until they greatly exceeded the value of the land. It was found also that tax titles in a great many cases did not stand legal tests; and in such cases the purchasers lost the land and also the money paid for it. Sometimes the defect that defeated the title would be traced to some early stage in the proceedings, and would be seen to have been of such a nature that it might easily have been obviated had attention been called to it in time. The Legislature had at first thought to increase the disposition to bid for tax lands by providing that the tax deed should of itself be proof of good title, leaving the party contesting it to show defects if he could do so. Afterwards it had gone farther and provided in substance, that mere irregularities in the proceedings should not defeat them. But where defects existed they were very apt to be fatal in their nature, and as the proceedings are or should be in writing, it was commonly easy to point them out. It therefore came to be very generally understood that tax titles were worthless; and land-owners sometimes deliberately allowed their taxes to remain unpaid, on a calculation that it was cheaper to litigate and defeat them than it was to pay them.

The uncertainty attending tax titles did not, however, discourage people from dealing in them. On the contrary it is well known that certain persons made it their business to attend and bid at tax sales, and that they made enormous profits out of them. The number was small in any particular county,—perhaps a single bidder or two only,—

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but they had their own way at the sales, and took the whole of as many parcels as they saw fit to select. It was a matter of course that there would be no competition in bidding so long as no reliance was placed on the titles Therefore if by any chance a poor man's tax remained unpaid and the land went to a sale, the whole was sure to be sold, though perhaps a tenth part of it would have paid the tax if taken at a fair valuation. Much less than a tenth part ought to pay it in many cases. The speculator who bought it calculated upon the inability or unwillingness of the owner to incur the expense and risks of a contest with all presumptions of law against him, and he expected to succeed in extorting a compromise on his own terms. And the less able was the owner to protect himself, by reason of poverty, or immaturity or other disability, the more certain was the speculator to make him the victim of extortionate demands.

At the commencement of the legislative session of 1881 the Governor called the attention of the Legislature to some of the difficulties which have been mentioned, and informed that body that the State then held nominal title to tax lands to the amount of more than $3,000,000, upon which taxes were constantly accumulating and remaining unpaid. That portion of these taxes which were local levies, constituting the major part of the whole, the State was required under existing laws to pay over to the localities, and thus the effect was that the State was regularly levying and collecting taxes from its people to make good to the municipalities the taxes which they failed to collect. The Governor made some suggestions by way of partial remedy for this anomalous condition of things. Having done this, he proceeded to say that, to revise the tax laws and bring all of their provisions in harmony, and make them easy of execution, more time would be required and more labor necessary than could be given or bestowed during the ordinary session of the Legislature, even though some of the members should abstain from other business for the purpose; and he therefore recommended "that provision be

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made for the appointment of a commission, large enough to cover a diversity of talent and experience, into whose hands the work of revision shall be committed." This commission he thought should not be required to report before the next session, giving ample time for examination and for the deliberation and discussion essential for perfect work.

The Legislature concurred in this recommendation of the Governor, and an Act was passed which authorized the Governor, by and with the advice and consent of the senate, to appoint a commission consisting of five proper and discreet persons, whose duty it should be to prepare a suitable bill for the assessment, levy and collection of taxes, and to report the same to the Governor on the completion thereof. The commissioners were required forthwith, after their appointment, to meet at the capital, and to proceed with all reasonable dispatch to prepare and complete the bill, and upon the same being reported to the Governor, he was required to give it general publication throughout the State, and to report the same to the Legislature if in session, and if not, then at the next general or special session.

The Act further provided that after the submission of the bill to the Legislature the members of the commission should be entitled to seats upon the floor of the senate and house of representatives for the purpose of explaining the provisions of the said bill, and for that purpose it should be the duty of the said commission to remain in attendance during the session of the Legislature until the bill was disposed of, and that no amendment should be made to said bill in either house until after the same should have been proposed and submitted to the commission for at least twenty-four hours, or until they should have an opportunity to report to the house in which the amendment had originated, their views in relation thereto. Pub. Acts 1881, p. 146.

In compliance with this Act the Governor proceeded to appoint a commission, three of whose members were prominent and able lawyers, a fourth had had large experience in business, and also in important official positions in the State government, and the fifth was an extensive and well-known

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farmer. It will probably be conceded that the choice of commissioners was admirable, and ought to have resulted in the preparation of an acceptable and safe tax system.

The commissioners immediately proceeded in the discharge of their duties, and prepared a bill which was given general publication through the State by the Governor, as the act providing for the Commission had required, and abundant opportunity was thus given for criticism and the pointing out of errors and defects. The Governor then convened the Legislature in special session to consider the bill, and the members had the advantage of being able to consider it at their leisure without having their attention drawn away by the pressure for legislation which commonly attends the regular session. When the bill was before the Legislature the members of the Commission had seats in the two houses, as was contemplated by the Act under which they were appointed, and all proposed changes in the bill were referred to them by the houses respectively, and by them referred back with their views. The members of the Commission were also permitted to be heard in open sessions. The Legislature contained at the time considerable legal ability, and it would hardly be supposed that any fatal defect in the system could escape notice or fail to be pointed out. Especially any conflict between the proposed law and the Constitution it would seem must certainly be discovered, either by the lawyers of the Commission or those in the Legislature, if not by other members. The result of legislative deliberations was the passage of the bill proposed, with slight alterations. As passed, it is entitled, "An act to provide for the assessment of property, and the levy and collection of taxes thereon," and it appears in Laws 1882, p. 7, and 1 How. Stat., p. 1265.

A brief abstract of the provisions of the Act will be necessary. The first eleven sections provide what persons and property shall be liable to assessment for taxation. Sections 12 to 26 inclusive provide for the assessment and the review thereof, and they make no considerable change in the old system except as they provide for a more careful review with a view to the prevention of inequalities and the correction

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of errors, first by a township board, and afterwards by the board of supervisors. Sections 27 to 43 relate to the tax-roll, and the proceedings of the officer in making collections thereon; and sections 44 to 51 inclusive provide for the return to the Auditor General of the lands on which the taxes have not been collected, and for subsequent payment at his office. In all these sections the general features of the former law with which the people were familiar, have been preserved. The fifty-second section provides that any lands upon which the taxes shall remain unpaid for more than one year from the first day of July next, after their return to the Auditor General as delinquent therefor, shall be subject to sale in the manner by the act pointed out.

The proceedings which are to lead up to a sale are then given, and they are the following: After the first day of July, the Auditor General is to prepare and file in the office of the county clerk a petition addressed to the circuit court for said county in chancery, giving therein a description of all lands in the county upon which the taxes have remained unpaid for more than a year from the first day of July after their return, and the total amount of the taxes with interest extended separately against each parcel of land, adding sixty cents for expenses. The petition shall be signed by the Auditor General, and shall pray a decree against the land for the payment of the several amounts specified therein, and in default thereof that the lands be sold. The Auditor General is to cause a copy of the petition to be published at least once in each week for three successive weeks prior to the time fixed for the hearing thereof, in some newspaper of the county to be selected by him, and shall publish therewith for a like time a notice stating the filing and purpose of the petition, and that it will be brought on for hearing and decree at the next term of the court, and that all persons interested in the lands, and desiring to contest the lien claimed thereon for such taxes or any portion thereof, shall appear in said court and file with the clerk their objections thereto on or before said day, and that in default thereof a decree will be taken as prayed in said petition. In such notice he shall also state

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that on the first Monday in May thereafter the lands described in the petition, and for which an order of sale shall be made, will be sold for the taxes, interest and charges thereon, as determined by the decree, at some convenient place in the county to be named in the notice. It is provided also that the publication of the notice shall be equivalent to personal service of notice on all persons interested, and should give the court jurisdiction to hear the petition, determine all questions arising thereon, and decree a sale of the lands. The Act then provides at length for the making of objections to any tax, and for a hearing of the same, and declares that in passing upon questions of the admissibility of evidence, the decision of the court shall be final. In case decree is given in favor of the validity of any disputed tax, the contesting party may appeal to the Supreme Court within twenty days, but must pay the amount of the decree to the county treasurer, to be held by him to abide the result in the appellate court. An appeal is also given to the State when a tax is held invalid. Such sales as are decreed, the county treasurer shall proceed to make on the first Monday of May, at the county seat. Each parcel described in the decree is to be separately exposed to sale, and the sale is to be made to the person offering to pay the amount charged against it and accept a conveyance of the smallest undivided fee-simple interest therein. No greater interest in any parcel is to be sold than is sufficient to pay the amount charged thereto; but if no person will offer to pay the amount and take a conveyance of less than the entire thereof, then the whole parcel is to be sold. A parcel for which no bid is made is to be offered a second time on a subsequent day, and if none is then obtained, the county treasurer is to bid off the parcel in the name of the State, for the use of the State, county and town, in proportion to taxes, interest and charges due each. The sales are to be reported to the court within twenty days after the time named in the notice for the commencement thereof, and all sales are to stand confirmed unless objections thereto are filed within eight days after the time limited for filing the report. The practice with reference to setting aside sales

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is to be the same so far as applicable as in a sale in equity on foreclosure of mortgages. But no sale is to be set aside for inadequacy of price, unless on payment of the amount bid upon the sale, with interest and costs, nor be set aside after confirmation except in cases where the taxes were paid or the property was exempt from taxation, in which cases the owner may move the court at any time within one year after he shall have notice of the sale to set it aside, and the court may do so on such terms as may be just. If a sale is set aside, the county treasurer is to refund to the purchaser the amount of his bid with interest. But no sale is to be set aside after the purchaser, his heirs or assigns, shall have been in actual possession of the lands for five years. The county treasurer is to report the sales confirmed to the Auditor General, who is to execute deeds to carry them into effect. The deeds are to convey an absolute title to the land sold, and be conclusive evidence of title in fee in the grantee, subject, however, to taxes assessed and levied subsequent to those for which sale was made. The court on application may put the purchaser in possession by writ of assistance. The lands bid off in the name of the State are to be subject to sale thereafter by the Auditor General for the amount of the purchase price and interest thereon at one per cent. a month, and are to be offered at auction at the annual sales.

Such are the general features of the Tax Law of 1882, and it is easy to see on an inspection of these what views were paramount in the deliberations of the Commission. The most important change introduced by them into the tax system of the State was this: That instead of leaving all questions respecting the validity of the taxes or of the proceedings to enforce them to be passed upon in a suit to determine the title after sale made, as was the case before, it is proposed to have such questions determined in advance of the sale, that the land-owner may not be subjected to the risk of losing his land on a claim which in good faith he contests, and also that purchasers may know what they are to get in case of purchase, and be thereby encouraged to engage in a competition at the sales which will result in the sales being made—as they

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were not before—at something like fair rates. If the law succeeds in accomplishing these purposes, the tax-payer will be benefited by it. And the State is likely to be greatly benefited by it, because under it fewer lands will be bid in by the State, and as to those which are thus bid in the State will account to the municipalities only as sales are made and it has money to account for.

Some further provisions of the law will be particularly noticed as occasion shall arise in the course of the discussion.

The Auditor General proceeded under the provisions of the Act, in respect to the delinquent tax lands of Marquette county, and on January 24, 1884, filed a petition in the office of the county clerk of that county, praying for decree for the sale of such lands as by the statute is provided. He published the required notice that the petition would be brought on for hearing and decree in the circuit court for the county of Marquette, on the first Monday of March, 1884, and that the lands for which an order of sale should be made would be sold for the taxes, interest and charges, on the first Monday of May, 1884, at the county treasurer's room in the city of Marquette.

The respondent, the Iron Cliffs Company, as owner of a parcel of land charged with a tax of about three dollars, appeared at the time appointed for the hearing, and demurred generally to the petition, and also assigned specially as causes for demurrer that the Act was unconstitutional and void for the following reasons: (1) No provision is made in said Act for personal service on resident owners of lands; (2) it provides for advertising a sale of said lands before obtaining a decree; (3) it cuts off the common-law right of trial by jury, which existed in such cases when the Constitution of 1850 was adopted; (4) it makes the decision of the circuit judge as to the exclusion or admission of evidence final, thus cutting off the right to appeal, except as the circuit judge may choose to permit; (5) the members of the Tax Commission, appointed under Act 153, Laws of 1881, were permitted to sit and act as members of the Legislature in all things except the right to vote, and were recognized by both houses

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as a standing committee while said first-mentioned act was pending, thus giving to said Tax Commission an influence in shaping legislation not contemplated by the Constitution, which rests the legislative power in the senate and house only.

The circuit court upon hearing overruled the demurrer, and the respondent, electing to stand upon its pleading, availed itself of the statutory privilege and appealed to this Court.

The questions before us on the appeal are the questions raised by this demurrer, and they involve the constitutional power of the Legislature to do what by this tax law it has assumed to do. If the demurrer is sustained the law will be defeated, and we shall have decided that the Legislature has assumed to exercise authority which does not belong to it. In cases heretofore presented for our examination we have indicated certain rules of propriety and caution which should be observed by us when thus invited to declare void the action of a co-ordinate department of the government, and to those rules we should be inexcusable if we did not strictly adhere. One of these is, that we must enter upon an examination of a constitutional question like this, assuming that the Legislature has been guilty of no usurpation. We are to remember also that we have no supervisory power in respect to legislation; that the law-making power is not responsible to the judiciary for the wisdom of its acts, and that however unwise or impolitic their acts may appear, they must stand as law unless the Legislature has plainly overstepped its constitutional authority, or lost jurisdiction in the attempt to exercise it, by failing to observe some express constitutional direction. And the case must be clear: a mere doubt on our part of the validity of what the law-making department of the government has undertaken to enact, is no ground for annulling it. These are commonplaces in constitutional law: they have often been declared by us, and still more often by other courts. There is reason to believe, however, that the rules are more often laid down than observed. When a court declares an enactment invalid,

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its judgment is in general conclusive: the Legislature cannot appeal against it, and the public is likely to accept what is adjudged as probably correct, and to acquiesce without questioning it. Under such circumstances it is to be feared that courts sometimes, without perhaps being conscious of the fact, proceed in the examination of questions concerning the constitutionality of legislation as if they were at liberty to consider the questions as questions of policy merely, and to dispose of them according to the view they should take of the wisdom of the legislation. There is ground for the belief that sometimes statutes have been annulled by courts on objections that purported to be grounded in the constitution, but which, if plainly stated, would resolve themselves into this: that the judges did not like the legislation. But every such case is mischievous in its tendency, for it shows that courts lay down proper rules for the government of their own conduct, and then fail to observe them. It is not less important that a court should keep carefully within its proper jurisdiction than that the Legislature should observe the limits set by the Constitution to its powers; for the spectacle of a court imputing usurpation to the Legislature when in the very act the court itself is chargeable with a like disregard of duty, is neither edifying nor wholesome. We ought therefore, when we assert that the Legislature has exceeded its powers, to be able to assign reasons for the assertion that are sound and substantial. And if there ever was a case in legislative history in which the observance of this rule of propriety would seem to be particularly obligatory beyond what it commonly is, this would seem to be that case; for here if we annul the legislation, we not only in doing so set our judgment above that of the Legislature, which under the circumstances we must think acted with great deliberation,—and which, as has been said, contained much legal ability,—but also above the concurring judgment of the able men who composed the Commission. The commissioners probably gave more time and thought to the questions involved than it has been within our power to do,

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and their judgments on legal questions we should probably agree are entitled to great respect.

With these preliminary remarks, which seem justified by the great peculiarity of the case, the points made on the demurrer will now be considered.

I. The first objection made to the statute is, that it makes no provision for personal service on resident owners of land. We think this objection without force; but in view of the necessary length of the opinion, we pass it without discussion for the reason that the respondent, by filing demurrer, has put itself in a position which precludes the raising it. The notice is for bringing the party into court, and has no other office; but one who voluntarily comes and files demurrer is in court as effectually as he could be upon any notice. The right to notice in his case is waived, and whether some other party might have insisted upon it is no concern of his. *Stone v. Welling* 14 Mich. 514; *Burson v. Huntington* 21 Mich. 415; *East Saginaw &c. R. R. Co. v. Benham* 28 Mich. 459. No one can be injured by want of any particular notice who has thus appeared: the very appearance is conclusive that he has had notice sufficient for the purpose, and has acted upon it. Courts never assume to declare a statute void on the objection of a party whose course of action has been such as to waive the objection. *Embury v. Conner* 3 N. Y. 511; *Detmold v. Drake* 46 N. Y. 318; *Mobile & O. R. R. Co. v. State* 29 Ala. 373. A more conclusive waiver than appears here would be impossible.

II. The second objection—that the Act provides for advertising a sale of the lands before a decree is obtained—was not argued by counsel, and we therefore treat it as abandoned.

III. The third objection is that the Act "cuts off the common-law right of trial by jury," which is said to have existed in "such cases" when the present State Constitution was formed, and therefore to be of right now.

This objection is not so specific as would be desirable. It assumes that there was a class of cases in which jury trial was matter of right, and that this case belongs to that class; but

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it does not undertake to specify the class, or to point out how or why this case belongs to it. This case is a proceeding in equity instituted by the State to enforce against a parcel of land a lien which it claims for taxes; and it is a different proceeding altogether from any which was known to our jurisprudence in 1850. It is a new proceeding, and therefore if jury trial cannot be had in it, that method of trial is not *cut off*, but is simply *not given*. There is nothing in the Constitution which renders it necessary to provide for jury trial in new cases. The constitutional provision is, "the right of trial by jury shall *remain*;" by which we are to understand merely that it is retained for the cases in which it existed before. *Tabor v. Cook* 15 Mich. 322; *Com'rs v. Seabrook* 2 Strob. 560; *Mead v. Walker* 17 Wis. 189; *Sands v. Kimback* 27 N. Y. 147; *Guile v. Brown* 38 Conn. 237; *Opinions of Justices* 41 N. H. 550; *Byers v. Com.* 42 Penn. St. 89; *Com'rs v. Morrison* 22 Minn. 178; *Scudder v. Trenton &c. Falls Co.* 1 Sax. Ch. 694: s. c. 23 Am. Dec. 756.

As explained on the argument the exception appears to be substantially this: When the Constitution was adopted, if a party claimed land by tax title, he must sue at law, and in that suit the defendant was entitled to jury trial. The proceeding now before the Court takes the place of such a suit. Therefore jury trial is matter of right. It is such a case as the suit at law to recover under a tax title, because it brings in question the validity of the tax proceedings.

But this more particular statement of the objection fails to show that the case before the Court is at all analogous to any in which, at the time the Constitution of 1850 was adopted, a party might have a right to jury trial. There was never any right to jury trial merely because of the fact that the validity of tax proceedings was in question. If a party brought suit at law against any collector or other officer connected with tax proceedings, or any township, on a claim that his rights were invaded by unlawful action, he would be entitled to jury trial; but if he attempted to enjoin tax proceedings he would be compelled to content himself with submitting his controversy to a court sitting without a jury.

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And what was true then is true now in both these classes of cases. In the regular course of tax proceedings no jury trial could then be claimed any more than it can now: they proceeded without the intervention of a jury until they resulted in a sale of lands,—if the tax on lands was not otherwise collectible,—and in the giving of a deed therefor which prima facie vested a title in the purchaser. When that deed had been given, if the purchaser sought to recover the land upon it and brought his suit in ejectment, the original owner was entitled to demand a jury. This is just as true now as it was then. If this proceeding shall ever reach the point when a sale shall be made and a deed given, and if the purchaser shall bring his suit to recover possession, the defendant will have an undoubted right to a jury trial. No provision of the statute undertakes to deprive him of it.

But this proceeding is as different, not merely in form but in substance, from a suit to recover upon a tax deed as can well be imagined. A suit to recover upon a tax deed is a suit by one claimant to land against an adverse claimant, and the question involved is, who has the right to the land? But in this proceeding there are no adverse claimants. The respondent is supposed to claim a parcel of land, and the State, instead of contesting the fact, admits it. What the State says is, that it has a lien upon the land, which the respondent, as owner of the land, should satisfy; and it proposes, unless the respondent can show some good reason to the contrary, to proceed to a sale of the land unless the lien is discharged. Now we repeat, though it seems scarcely necessary, that in tax proceedings, from the time they were begun until they resulted in the giving of a deed, the land-owner, unless he instituted some suit at law upon a claim that a legal right was invaded, was never entitled to lay his complaint of the proceedings before a jury; and in that respect he is now, under this act, just where he was when the Constitution of 1850 was adopted.

But it may be said and is said, that in the event of a sale taking place and of a deed being given in these proceedings, jury trial would be an idle ceremony, because the Act makes

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the deed conclusive evidence of title in the purchaser. In response to this it may well be replied—and the experience of every practicing lawyer will confirm it—that jury trial in cases involving the validity of a tax deed was always an absurdity. No other cases can be named in which the right exists at all, where it is so much a matter of mere useless form, and where the jury is so entirely without either the opportunity or the right to apply their own judgments to the case. Such a trial almost always involves only questions of law, or questions determinable by records; or if questions of fact are involved, they commonly concern records, and are peculiarly inappropriate for the consideration of a jury. Such cases are therefore either tried by the court without a jury, or if a jury is called, the court by his charge determines what the verdict should be, and the jury merely bow their heads in assent. Jury trial, therefore, as a great constitutional privilege in such cases, if not calculated to provoke a smile as an absurdity, is certainly without any claims upon courts for the straining of a point for its protection. But it may be added that, under the system which this Act undertook to displace, the tax deed of itself gave title, and the claimant's case was made out on its mere production. It is true it might be assailed and the title defeated on showing errors in the nature of jurisdictional defects; but jurisdictional defects are equally fatal under this Act. The judicial investigation only narrows the range of the inquiry which may be gone into after the deed is given, and perhaps limits it to the jurisdiction of the court itself.

But we do not deem it our duty to consider in this case every question which the parties may see fit to make, even though the record neither raises it nor can raise it. We have waived objection to answering the question whether resident owners are entitled to personal notice, but have done so because it referred to a proceeding already gone through with. But we must decline to consider what would be the effect of proceedings not yet taken, and which are wholly contingent and uncertain. The attempt to bring under adjudication the question of the right of the Legislature to pro-

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vide for putting a tax purchaser in possession by writ of assistance, or to make a tax deed conclusive evidence of title, are questions which at present, in this controversy, are merely abstract and speculative. No deed has yet been given. It may be that no deed ever will be given. If none is given, no party will ever be in position to move the court for a writ of assistance, or to claim that his evidence of title is conclusive. When the time comes that such a question can be raised, if it ever does come, it will be quite time to decide it. We said in *Upton v. Kennedy* 36 Mich. 215, 218, that "it is a sound rule of policy no less than of courtesy, that a court shall abstain from questioning the validity of legislation until it becomes absolutely necessary in the decision of a pending controversy. When the necessity arises the court must apply the law that controls the case, whether it be statute or Constitution; but a conflict between the statute and the Constitution is not to be inquired into until it is found to affect some interest involved in a suit or proceeding which the court is required to pass upon." The same doctrine was reiterated in *Powell v. Eldred* 39 Mich. 552. The question, therefore, of the effect of the deed cannot be raised now; any dictum by us concerning it would determine no right, and would for that reason be improper and extrajudicial.

To avoid any misunderstanding on this point it should be stated that the court itself, which passes upon the tax proceedings and which determines the question of confirming the sale, does not declare what shall be the effect of the deed. The court confirms the sale or refuses to confirm it. It is the statute which says, if the sale is confirmed and a deed is given it shall be conclusive evidence of title. The deed is not a part of the judicial proceeding, but the giving of it is the subsequent act of the administrative officer. If as matter of constitutional law, the Legislature cannot give this conclusive effect to the deed, the fact is immaterial to the judicial proceedings and can have no effect upon them. The court itself, if it were asked upon the hearing on confirmation to declare that the deed which might be given

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thereafter should be conclusive evidence of title, would be powerless to comply. An opinion by the judge to that effect would be as absolutely without force as if expressed by the clerk or the crier of the court. The question of conclusiveness can only arise for judicial determination when a deed has been given and some party claiming under it attempts to enforce a right to possession.

What is said on this point is applicable to the case of an application to the court for a writ of assistance. The statute says the court may issue such a writ to put the purchaser into possession, and the respondent denies the power. Let it be admitted that no such power exists, and the proceeding now under consideration will nevertheless stand unaffected. No writ of assistance is now applied for, and we cannot say that it ever will be. The only question now is, whether a sale shall be ordered: nothing else is presented by this record.

When a purchaser attempts to recover the land purchased, if it shall turn out in the ejectment or other proceeding instituted by him that the legislative power to give this conclusive effect to the deed is not sustained, the judgment to that effect could have no retroactive force. It could affect neither the validity of the law itself, nor of the order of sale. On the contrary, the question of constitutional law which arises on the deed would go only to the validity and force of this particular provision. If the Legislature has not exceeded its powers in prescribing this judicial proceeding, the proceeding, if regularly taken, must stand. If it has exceeded its powers in making a deed, when given, conclusive, then the purchaser who has obtained a deed, may be disappointed in its value to him, but nevertheless he has it and must make the best of it. If it is not conclusive proof of good title in him, then the adverse claimant will be entitled to point out defects.

Declaring tax titles conclusive is no new thing in legislation. It is matter of familiar history in this State that the Legislature has repeatedly undertaken to give greater force to tax deeds than could legally be sanctioned. But the

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attempt, though unsuccessful, was never supposed to affect the whole tax law. We do not deem it important to enlarge this opinion by citing the numerous decisions which are to be found in the books of reports on this subject; it seems entirely sufficient to barely call attention to the familiar principle that one bad section in a statute has no necessary effect to invalidate the whole (*Com. v. Hitchings* 5 Gray 485; *Smith v. Adrian* 1 Mich. 495; *People v. Mahaney* 13 Mich. 481), and then to add, what we think no one will dispute, that a case like this has always been held to be within it. The territorial statute of 1827 declared that the deed given on a tax sale "shall vest in the person or persons to whom it shall be given an absolute estate in fee-simple," and "shall be conclusive evidence that the sale was regular according to the provisions of this act:" Rev. Laws 1827, p. 378; 1833, p. 96; but the courts, while they construed this section so as to deprive it of its plain meaning and to defeat the legislative intent, yet raised no question of the validity of the statute in other respects: *Scott v. Young Men's Soc.* 1 Doug. (Mich.) 121; *Latimer v. Lovett* 2 Doug. (Mich.) 204; and the statute continued to be acted under and enforced until repealed by the Legislature many years afterwards. If the court, instead of construing away the meaning of the Legislature, had contented itself with saying this section so far as it undertook to make the deed conclusive evidence was unconstitutional, the effect would have been the same,—the statute would have remained, and would have been enforced in all other particulars. Possibly, if the time ever comes when the court can with propriety pass upon this provision for making the deed conclusive, it will deem its duty to be to do in respect to this Act what was done in respect to the Act of 1827, and to hold that, under a proper construction, defects in the tax proceedings may be shown. But the time for ruling upon that question can only arise when there are adverse parties entitled to raise it, and when they actually do raise it, and are heard by counsel upon it. There are no such parties now. The

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question now is whether the State has a lien which the land should be sold to satisfy.

It is often said that a court of chancery is not the proper tribunal for the trial of titles to land; and perhaps a notion has arisen from this that there is some constitutional impediment. If it were the fact, it would be immaterial in this case, for this, as we have already said more than once, is not a case in which titles are to be tried, or in which a title is even disputed. But the notion that the chancery court cannot try titles to land under proper legislative authority is quite baseless. My brother Campbell showed this very satisfactorily in *Hoffman v. Beard* 22 Mich. 59, 69. That case was a suit in partition, and the land was held adversely to the complainant. The title was purely legal, and no impediment existed to the trial at law, and the court thought it ought to be so tried. This was not upon the ground of any want of power in the Legislature to confer jurisdiction upon the chancery court, or of the court to exercise the jurisdiction without special statutory authority, but only that it was more consistent with the general course of equity jurisprudence to have a question of legal title to land sent to a court of law for trial. But Mr. Justice Campbell was of opinion that the complainant had an absolute right under the statute to have the title determined in equity. He says: "An idea seems to have prevailed that controversies concerning legal titles can only properly be determined in common law actions, and that whenever such a dispute arises in a partition suit, and is a real and not pretended controversy, the proceedings should either be dismissed or stayed to abide the result of an action. It is not to be denied that there are some cases, and more dicta, which assert such a doctrine. But whatever may be their force under other systems and policies, they cannot, it seems to me, be of any force against the clear terms of the statute, and would not apply to our system even if the laws were less explicit." Page 69. "The courts of this State, when we had a separate chancellor, never required aid in deciding legal questions; and now that the same judges act in the double capacity, it

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would be a gross absurdity to act on any such theory as rests on a supposed unfitness in equity judges to decide the law." Page 70. "If a case is not required to be tried by jury, it would be of no use to shift it from one court to another before the same judge. And if there are any questions of fact that it is desirable for a jury to pass upon, it is better to have them presented separately as chancery issues, than to have them thrown before the jury with all the mixed questions that may be presented by an ejectment suit. Land titles are usually established by evidence much more fit to be passed upon by a judge than by a jury. And since our Constitution favors the removal of all needless distinctions between law and equity, and our statutes have furnished ample means for disposing of every kind of question in courts of equity, I can see no good reason for resorting to a practice that was never meant to exist under such a system as ours." Pages 71, 72. There is more to the same effect. The majority of the Court differed with Mr. Justice Campbell about the propriety of having the title in that particular case tried in a suit at law, but there is not a word in the opinion of the majority from which it can be inferred that any member of the Court doubted the power of the Legislature to provide for the trial in equity of any legal question that might arise in partition or in any other equitable suit. And if there is anything in the Constitution which limits the power to cases of partition, we have not discovered it.

The objection that this Act in some way impairs the constitutional right of jury trial has been found very embarrassing in this case, from the fact of an inability to perceive what bearing much that has been said in favor of the objection can have or was supposed to have. It seems to us that very much of it may be passed without notice, as not being susceptible of any conclusion for or against the validity of this law. Suppose it to be true—as we suppose it undoubtedly is—that the king or queen in England can create no new court of equity or enlarge the equitable jurisdiction of no existing court; of what practical interest is the fact to us in this country? We have no king here, and the officer

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whose functions make the office most analogous to that of the king has not assumed to create courts or to enlarge the jurisdiction of courts. That authority in this country is exercised by the Legislature; and if any argument is intended to be deduced from the British system against the power of an American legislature to create new chancery courts, or enlarge the jurisdiction of existing courts, it is Parliament, and not the king, whose power should be compared. But no one ventures to say that Parliament could not do what the Legislature of Michigan has assumed to do; and it may be said, we presume, without danger of contradiction, that its power to create and enlarge equitable jurisdictions is not only undoubted but unlimited. That it may do this in such a way as to take away the right of jury trial at law was sufficiently shown in *Bovill v. Hitchcock* L. R. 3 Ch. App. 417. Such being the case, the question what the king could now do or could ever have done in the same direction, may possibly be one of curious historical interest, as may also be the question whether King Alfred, when hiding from his enemies, was berated by the neat-herd's wife for neglecting to watch her baking cakes; but the one question has no more practical value at this time and in this country than the other.

As it is the "common-law right of trial by jury" which it is said has not been preserved in this case, it may be necessary to remark that the Constitution in its guaranty of the right does not make use of the term "common law;" it merely says, "The right of trial by jury shall remain." Undoubtedly this means that the right shall continue to exist with its accustomed common-law incidents; but that it shall remain as a peculiar attribute of a common-law court is an inference which is quite unfounded. Indeed, nothing is more plain, when the Constitution is read in the light of contemporary history and opinion, than that it was not intended there should be distinct common-law and equity courts after the Constitution took effect. The Constitution in terms vested the judicial power "in one supreme court, in circuit courts, in probate courts, and in justices of the peace." Article 6,

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§ 1. It was intended that the circuit court—not two courts but one court—should be the court of original jurisdiction in civil cases of both law and equity cognizance, and that in that one court the distinctions between law and equity proceedings should, as far as possible, be abolished. Article 6, § 5. Notwithstanding this constitutional intent the distinctions have been kept up, and the circuit court has been spoken of and regarded, not as one court but as two—a court of law and a court of equity. To this extent there has been an evasion of the Constitution; but to go further and say that the jury trial which the Constitution preserves is a trial that must take place in a court of common law, as distinguished from a court of equity, would not be a mere evasion of the Constitution, but would be in direct and positive antagonism to the provisions which were designed to bring about the abolition of the distinctions in law and equity proceedings. If the Legislature were to provide that hereafter the complaint of a party instituting a suit, whether before of equitable or of legal cognizance, should be in the form of a bill in chancery, briefly reciting the facts on which relief is claimed, and that any issue of fact made upon such a bill should be triable by jury, the law for that purpose, instead of being opposed to the Constitution, either in its merging the two jurisdictions or in its providing for the trial in chancery of cases before triable at law, would be entirely in harmony with the spirit and purpose of the Constitution, and would stand justified and supported by the very words of that instrument.

We have given more attention to this part of the case than it seems to us entitled to, for the reason that in the minds of some persons there seems to be a peculiar sacredness about jury trial, and an inclination to battle for it as a constitutional privilege in cases in which it never existed at all. Perhaps this is due in part to the fact that one branch of the controversy which resulted in the independence of the American colonies was connected with a violation of this right. That fact has been referred to in this case; and it has been mentioned that the right was violated in revenue cases,

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as if the right existed more particularly in those cases than in others. But the fact is that no case at all analogous to the one now before us arose at that period at all, and there is no warrant in the history of the times for saying or inferring that a statute like the one now under consideration would have been objected to as invading constitutional rights. The colonists were contending for rights that had substance and value in them, and they very justly denied the right of the government to issue general warrants in revenue cases, or to send alleged offenders against the revenue laws out of the colony for trial. But it would require a very vivid imagination to picture to the mind the leaders in the American revolution endeavoring to rouse a continent to arms, because a statute had undertaken to empower a court to examine into tax proceedings and pass upon their regularity before property should be sold for the taxes.

The case of *Tabor v. Cook* 15 Mich. 322 has been referred to by counsel as having a bearing here. That case is one in which a party undertook to bring ejectment in the form of an equity bill. We held that the statute did not undertake to permit such a suit. We also said that, as in ejectment, the party in possession had a constitutional right to have his case tried by jury, the statute could not transfer the jurisdiction to equity unless it should make provision under which jury trial could there be demanded and had as matter of right. We adhere to that view still.

IV. The fourth objection is that the Act makes the decision of the circuit judge final on questions of the admissibility of evidence, "thus cutting off the right to appeal except as the circuit judge may choose to permit."

This point was not noticed on the argument, and the natural and reasonable inference would be that counsel, on consideration, had become satisfied it was without force. In our discussion of the case we should therefore follow the example of counsel, and pass it without remark, if in our own consultations importance had not been attached to it. Lest, therefore, we might be thought, by not noticing it, to concede that it possessed some force, we take it up in its order.

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As the questions in the case are merely questions of the constitutional power of the Legislature to pass the act in question, this objection must be understood to be based upon a claim that a party has a constitutional right to an appeal, and also to have the appeal cover the whole case, including rulings of the trial judge on the admissibility of evidence. If this is not claimed the objection is pointless. We shall therefore assume that to be the claim.

But if that is the claim, upon what is it founded? What general principle of constitutional law, or what provision of the State Constitution, directly or by reasonable implication gives such a right of appeal? If the right exists, it must have a basis that can be defined, pointed out, and made tangible to the common understanding: it cannot exist as a mere vague and loose notion, which a judge may embrace and act upon if it suits his ideas of what ought to be, and reject if it does not. Constitutional rules, above all others, are supposed to have certainty and definiteness, and not to depend upon the opinions of judges upon questions of policy and expediency.

No general principle of constitutional law giving a right of appeal has been mentioned, and we know of none. We therefore assume that there is none. Perhaps it may be thought by some persons that the right of appeal should be universal, but this would probably be doubted by as many others. Every one is entitled of right to have a judicial determination of his controversies, but no general principle entitles him to remove the determination from one court to another until the court of final resort is reached. The power of final decision must rest somewhere, and in a great many cases, it perhaps subserves the purposes of justice quite as well if the first tribunal is given final powers. But it would, as we suppose, have final powers unless expressly or by necessary implication an appeal was given by statute or Constitution.

If any provision of the Constitution gives a general right of appeal from the inferior courts to the Supreme Court, it must be that which declares that "the Supreme Court shall

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have a general superintending control over all inferior courts, and shall have the power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only." Article 6, § 3.

Here it will be perceived a general power of superintendency is given, with authority to issue certain original writs, and then it is added that except as to such writs the jurisdiction of the Court shall only be appellate. What appellate jurisdiction it shall have, whether a jurisdiction extending to all cases, or only one extending to some cases to be otherwise pointed out and specified, is not by this provision declared. If it is not an unlimited jurisdiction, it must necessarily in some manner be defined.

We shall probably hazard nothing in saying that, up to the time of the hearing in this case, the jurisdiction of this Court to take cognizance of cases on appeal has always been understood by the Court itself to depend upon express statute, and that a party could not claim the right to appeal unless some statute gave it. In other words the understanding has been that while the Constitution gave appellate jurisdiction to the Court, a statute was necessary to make the jurisdiction applicable to any particular class of cases. It has also been just as well understood that the statute which gave the appeal might limit the power of this Court to consider questions upon it.

This general statement is made with great positiveness, because the Court constantly acts upon this understanding. There is a very large class of questions which are decided finally and conclusively by the circuit courts. We cannot review their decisions because there is no statute providing for it, and they are therefore conclusive, though we may be able to see in particular cases that great injustice has been done. The case of an application for a new trial in the circuit court is one of these. *Cuddy v. Major* 12 Mich. 368; *Penn. Mining Co. v. Brady* 14 Mich. 260; *Johr v. People* 26 Mich. 427. A statute might unquestionably make the

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decision on such an application reviewable; but we have no such statute.

But this point is not one resting upon a course of practice merely; it has been directly affirmed on argument more than once. In *Weed v. Lyon* Walk. Ch. 77, where a complainant against whom decree had been entered had failed to file his appeal bond within the time limited by statute, Chancellor Manning said: "The right of appeal from this court to the Supreme Court is a statutory right, given to either party who may be dissatisfied with the decision, on certain conditions, which can no more be dispensed with by a court of equity than by a court of law where the right has been lost by an omission to comply with the statute. It is the complainant's misfortune that the appeal bond was not filed within the ninety days; but it is not in the power of the court, under the circumstances of the case, to give relief." In *Drake v. Andrews* 2 Mich. 203, the appellant was one day late in taking his appeal. He claimed an additional day because the last day happened to be Sunday, but the court did not allow the claim. Wing, J. said: "The statute is plain. It is rather a rule of convenience, but we think we have not the power to extend the statute." "We must stop where the statute stops, and therefore we are reluctantly constrained to grant the motion of the appellee, and dismiss the appeal with costs." It was a hard case, and the court would have sustained the appeal if it had possessed the power. In *Appeal of Dickinson* 2 Mich. 337, a similar decision was made in a probate case; in *Canfield v. Brig. City of Erie* 21 Mich. 160, in a water-craft case; and in *Draper v. Tooker* 16 Mich. 74, Justice Christiancy, speaking for the Court, says that the circuit court has "no power" to allow an appeal from a justice except on the statutory conditions.

Numerous cases to the same effect might be cited, but it seems needless, as Justice Campbell, in the recent case of *Cady v. Knit Goods Mnfg. Co.* 48 Mich. 133, 137, expressing the unanimous opinion of the Court, said: "No appeal lies in any case except where given by statute." This, we think, should be conclusive.

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We might show by reference to statutes, if it were important, that the Legislature has repeatedly enlarged and also restricted the jurisdiction of this Court, and the Court has unhesitatingly obeyed the legislative will, regardless of any opinion it might have had of the wisdom of the legislative action, and solely because it was supposed that the legislative will, expressed in proper form, was *law*, and conclusive upon the Court. The case of the statute which took from this Court the power to review judgments of courts of law upon the facts (Laws 1867, p. 198), is an illustration of a statute which restricted our jurisdiction. The effect was that the appeal which was general before, became partial afterwards; that is, it became restricted to a particular class of questions. *Heimbach v. Weinberg* 18 Mich. 48. A recent act giving a new jurisdiction is found in Pub. Acts 1873, p. 119. *Willard v. Magoon* 30 Mich. 273.

It is not necessary for us to inquire into the reasons of the Legislature for making the decision of the circuit judge on questions of admissibility of evidence final, but it is easy to see that if such questions might be reviewed on appeal, the ability of the State to collect its revenues promptly would be more than doubtful. We should then have in tax cases, as we often have in other cases, trials in the circuit court not conducted by the parties with a view to just results, but with a purpose to get error into the case if possible, that there may be delay and a reversal. And there is no doubt that the trial judge has some advantages over the appeal court in passing upon such question. Of two judges with equal ability and legal knowledge, one of whom tries the cause and the other reviews the trial, the first, who sees it all pass in successive steps before him, is most likely to see the just bearing of everything offered in evidence, and therefore most capable of deciding what should and what should not be received in evidence. The Legislature was probably influenced to some extent by a knowledge of this fact.

V. The remaining objection made by counsel is that the members of the Tax Commission, by being allowed to sit, act and speak in the two houses while their bill was under

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consideration, was given an influence in shaping legislation not contemplated by the Constitution, which vests the legislative power in the senate and house only. This is very strenuously insisted upon.

Two general reasons are advanced in support of the objection: *First*, that the Legislature in providing for the presence and participation of the commissioners while their work was being considered, delegated to them some portion of the legislative power, which constitutional principles do not permit; and *second*, that the presence and participation of the commissioners in the business of the session was of itself unlawful and rendered the action which was taken invalid.

The first reason would have force if it were based in fact, but it is not. The Legislature did not part with any portion of its power, but retained it undiminished throughout. It was never proposed to surrender to the Commission any legislative authority, but on the contrary, the act under which the tax bill was prepared plainly assumed, if it did not in terms say, that all powers of final action were to be exercised by the Legislature itself. And they were so exercised. It was indeed provided that the members of the Commission should have seats in the two houses, and that all proposed changes in the bill prepared by them should be referred to them for their consideration, with the privilege of expressing their views. But the Legislature in making this provision did not detract in the least from its own powers, or tie up for a moment its hands. It might at any moment have taken from the commissioners the privileges which had been given, or it might have refused to permit them to be exercised. The privileges existed from hour to hour only at the legislative will. This being so, it is plain that the Legislature had parted with no powers. A case of delegation of power exists when the Legislature, instead of deciding for itself whether a proposed law shall be enacted, refers it for decision to some other authority; as, for example, to a popular vote. *Barto v. Himrod* 8 N. Y. 483. There are a num-

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ber of cases holding that the delegation of the power of final action is void, but none which go any further.

It must therefore be the participation of the commissioners in the legislative deliberations in this case that creates the difficulty, if there is one, and not the fact that a privilege of participation was promised by the act under which the commissioners were appointed. Whether there was any constitutional objection to such participation is then the question to be considered.

It is very easy to understand the grounds on which the Legislature deemed it advisable that the commissioners should be present and be heard when their work was being considered. It was supposed the Governor would select persons for the Commission who, in respect to the duties to be performed, would be men of more than ordinary competency—men who might be considered experts in tax matters. It was also supposed that these experts would devote a large amount of time to the duty of preparing a bill, and that the bill when prepared would be harmonious in all its parts. The subject is so broad that the bill would necessarily be somewhat complicated, but every section would have its bearing upon other sections; every new feature proposed to be introduced in the tax system would have its reasons; every modification of the old law would be made on a consideration of its actual workings. The commissioners would have considered all these matters; but it would be too much to expect that this would be the case with every member of the Legislature, or even with any considerable proportion of the members. It might very well happen, therefore, that the Legislature, coming newly to the examination of a bill prepared by others, would unintentionally impair its provisions and render the bill as a whole worthless by amendments, the full effect of which they did not perceive, or by striking out vital provisions, the reasons for which were not made known to them, or by doing something else with the bill unadvisedly which an expert familiar with its provisions would readily have guarded against. The Legislature, in view of these facts, provided for the presence of the commissioners in order

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that, as far as possible, the final action should be taken with full knowledge and on proper deliberation.

This seems a very proper thing to do; just such a thing as a legislature ought to do, when practicable, in dealing with so complicated and difficult a subject. If legislatures were more often equally careful to be fully advised by experts before legislating upon intricate and difficult subjects, we should be saved some crude and mischievous legislation. If, for example, the regulation of a particular business was proposed, the Legislature would be wise and deserving of commendation if it should avail itself of the experience and observation of persons engaged in that business in the various capacities of proprietor, agents and laborers of all grades, and allow them to inspect and criticise any proposed bill. And if the effect of the criticism were to induce the Legislature to modify any proposed action, it would be highly probable that the modification had foundation in wisdom and was therefore commendable.

Not only is such a course apparently proper because of its wisdom, but it is not uncommon. It is almost a matter of course at Washington and at some state capitals, to call experts before legislative committees, or to permit them to appear there when information is needed of which they are peculiarly possessed. The right to do this has never been disputed so far as we know. It is not so common to have such persons appear and express their views to the full house; but that also is sometimes done, and would seem, when practicable, to be the more desirable course, because then all the members can receive information from them directly, instead of obtaining it indirectly and perhaps imperfectly or inaccurately as reported by others.

If this is objectionable on constitutional grounds because the result is that the views of others modify the legislative action, then it must be inadmissible for the same reason to have a commission prepare a bill for the Legislature to act upon. The very preparation of the bill would be likely to result in the whole or some portion of it being adopted and passed; and then it might be said that the Legislature had

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been influenced from an unconstitutional source in its action. The same might be said with quite as much reason, if one privately were to urge his views on a pending measure upon a member of the Legislature; and in fact such a private approach of members is much more objectionable than any public discussion in open house can be. And if the objection which is now made were pushed to its natural and logical result, legislators would be compelled to frame and enact laws without the privilege of enlightening their judgments by the knowledge, the experience, the observation and the good sense of others. Legislation under such circumstances would generally be evolved from the inner consciousness, and might do very well for a Utopia, but would be almost certain to be crude and impractical and therefore unwise for an American commonwealth.

A number of cases have been cited to us where it has been held that where a duty is devolved by law upon a certain body of men, and they admit any other person to a share in their deliberations, their action is rendered null thereby. Those cases are correct and have our full approval, but they are all cases where the body has judicial functions to perform. The difference between a judicial body and a legislative body in this particular is so marked as to make directly opposite rules applicable in the two cases. And it is a difference that rests upon such manifest reasons that no one need be misled in respect to it. A judicial body is to act upon fact and law as they are submitted to it regularly and publicly, and with the parties present; and it is to decide upon what is thus submitted. It is inconsistent with judicial methods that judge or jury should investigate facts independently, or be even talked with respecting facts not regularly submitted. If jurors, while a case was pending before them, were to make investigations of their own, and make the case a subject of conversation with third parties, they might be and ought to be punished as for a contempt of court for so doing. But legislators are confined to no one method and no particular time in obtaining the information they are to act upon. They get it where they can, and when and of whom they

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please. The more they endeavor to learn that which others can inform them of, the better legislators are they likely to be.

The Constitution of the State recognizes this difference in the provision that "the people have the right peaceably to assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances." Article 18, § 10. This section gives and was intended to give to the people the right to present their views to the Legislature on any subject which is of legislative cognizance. The members of this Commission had an undoubted right, from day to day and from hour to hour, to put their views on proposed changes in their bill before the Legislature in the form of petitions; and that body could not have refused to receive the petitions. And it seems to us quite idle to say that where the Legislature is compelled to receive the views of a party presented in writing, it has no power to permit him to appear in person and express the views orally.

But the right of petition does not exist in respect to judicial action, and an attempt to exercise it would in general at least be a criminal contempt. We have only to suppose a case of parties petitioning a court to render a judgment in favor of a particular party, or sending to a jury a request that they would acquit or convict a prisoner who was on trial before them, and it would be apparent at once that the attempted act of petition, which towards a legislative body is matter of constitutional right, is towards a judicial body a serious offense against law and justice. And the difference in the two cases in the application of principle springs from this very difference in the methods of acquiring the information which is to be acted upon; the judge and juror being restricted to definite time and definite methods, and the legislator being left wholly at large to enlighten his mind and his judgment as he may, and being in fact compelled to listen to those whose right it is to "instruct" and "petition" him. The fifth objection, then, like the others, has no substantial basis.

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VI. The criticism of the statute has not, however, been restricted to the objections specially assigned with the demurrer, but has gone into a minute examination of the various sections, with a view apparently to show that some of the provisions are crude and imperfect, some are liable to operate unjustly, and some in possible contingencies will not operate at all. From all this criticism an argument is made against the validity of the Act, but upon what principle this Court is expected to set aside a statute for such reasons, we have been unable to understand. The criticism referred to raises questions of policy, accuracy in legislation and justice, and might have force if addressed to the Legislature, whose business it is to solve questions of the sort when considering how and in what form their will shall be expressed as law. But when made to us, accompanied with an appeal that we shall annul existing legislation, it is made to induce us, if possible, to usurp powers which do not belong to us; to sit without right as an appellate authority above a co-ordinate department of the government in respect to matters which belong to that department exclusively. Nothing is better settled in constitutional law than that questions of policy and justice in legislation are for the Legislature itself, and that courts have no authority to set their judgment against that of the Legislature in respect to such matters. The courts have no business to run a race of opinions upon points of right, reason and expediency with the law-making power. *Madison &c. R. R. Co. v. Whiteneck* 8 Ind. 217; *Pennsylvania R. R. Co. v. Riblet* 66 Penn. St. 164, 169; *Martin v. Dix*, 52 Miss. 52, 64; *Danville v. Pace* 25 Grat. 1, 8; *Re Goodhue* 19 Ch. (Ont.) 366; *Reithmiller v. People* 44 Mich. 280. We might with entire propriety, therefore, decline to consider all objections of this nature, as raising no questions with which we have a right to concern ourselves; but as notice has been taken of them in this case, we may be pardoned for giving them some attention also. We shall do so, however, to a limited extent, and mainly for the purpose of showing that most of the objections now made to this Act might have been made with the same force to any statute on

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the subject which has been in existence in this State for a long time past, and that if this Act is invalid on these grounds, the courts for a generation past have been enforcing invalid tax laws.

For example, counsel for respondent in his brief says that "if a person by inadvertence does not pay his tax, he is likely to lose his land if the law is valid." This is very true, and has always been true under any tax law which ever existed in this State, and is probably true under tax laws in every state of the American Union. Legislatures have considered it a necessity to the collection of state revenues that property owners should at their peril be required to take notice of tax proceedings and pay their taxes. And it is a new suggestion altogether that the inadvertent omission of the land-owner to pay his taxes can be reason either for the State to lose its revenue or for a court to hold the tax law invalid.

It is complained of as something opposed to all the maxims of jurisprudence, that in the proceeding for obtaining an order of sale the taxes specified in the petition are to be presumed legal, and a decree to be made therefor unless the contrary is proved. But there is nothing new or strange in this, either in this State or elsewhere. For forty years before the institution of this proceeding the statutes of this State had made the tax deed "prima facie evidence of the regularity of all the proceedings to the date of the deed" (Sess. L. 1843, p. 80), thereby making the mere giving of the deed by the Auditor General proof that a tax was correctly levied as stated therein; and the courts in a series of decisions beginning with *Lacy v. Davis* 4 Mich. 140, and including such cases as *Upton v. Kennedy* 36 Mich. 215; *Stockle v. Silsbee* 41 Mich. 615; *Silsbee v. Stockle* 44 Mich 561; *Perkins v. Nugent* 45 Mich. 156; and *Sinclair v. Learned* 51 Mich. 335, have enforced these statutes. The first statute on the subject which was enacted after the Constitution of 1850 took effect, provided that in suits for the collection of unpaid taxes the assessment roll might be produced in proof of the taxes, "and if it shall appear from said assessment roll that

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there is a tax therein assessed against the defendant in such suit, it shall be prima facie evidence of the legality and regularity of the assessment of the same; and the court before whom the same may be pending shall proceed to render judgment against the defendant, unless he shall make it appear that he has paid such tax." Comp. Laws, 1857, § 830. This provision, or something like it, has been in existence in this State ever since, and recoveries for taxes have been had under it in a great many cases without any such point being made or thought of as is now insisted on. The recent cases of *Wattles v. Lapeer* 40 Mich. 624; *Putnam v. Fife Lake* 45 Mich. 125; *Lake Shore &c. R. R. Co. v. People* 46 Mich. 193; and *First Nat. Bank v. St. Joseph* 46 Mich. 526, are cases of such suits which came to this Court on other questions without this being raised. But indeed the rule that the tax roll shall be sufficient affirmative evidence of the tax is the only reasonable and practicable rule that can possibly be prescribed for the case. It is perfectly reasonable, because the tax-roll is in itself a species of execution, and the collector has a right, which nobody disputes, to proceed to enforce payment of the taxes by seizure of property; which could never be admitted unless the taxes were already established claims. And any other rule would be impracticable because it would make the collection of taxes enormously troublesome and expensive. Suppose the property owner, where the collector demanded payment of the tax, was at liberty to reply: "I will pay the taxes when you prove they have all been voted, assessed and levied in accordance with law." The absurdity of any rule of law which would permit this, and which would require the collector to produce his proofs before he should levy, would be too apparent to require argument or illustration. But it would be quite as reasonable as to require similar proof when the State brings suit. All that is wanted in the one case or in the other is that the officer or the court should have sufficient prima facie evidence of the tax; and what proves it for the officer's action ought to prove it for the action of the court. Any other rule would in many cases make the cost of collection

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greater than the amount of the tax, and the State would be in danger of being bankrupted in the attempt to collect a revenue.

But we think we may well be content to rest the defense of this feature of the law on the enforcement which similar provisions have had in the State for so many years without their constitutionality being questioned.

Section 78 of the Act empowers the Auditor General, in the highly improbable contingency that the county treasurer shall refuse or neglect to give bond for the performance of his duties in making sale of the lands, to "employ in behalf of the State, some other person to conduct the sales of lands delinquent for taxes, and to receive payment therefor under his direction," &c. This is criticised: it is said the Auditor has no power of appointment, and, moreover, that the statute is deficient in not making provision for proper return of the doings of any person so employed. This raises another question which is purely abstract and speculative in this case. There has been no such appointment; it is not known there ever will be. If there should be, and the sales for any particular county should fail for that reason, the validity of the law would not thereby be impaired, or the sales in other counties affected. If the fact that in some possible but highly improbable case a statute would fail to accomplish its purpose, though it did so generally, were to be fatal to the law itself, we should have very few valid enactments on our statute books.

But this section also is old. It appears as section 96 of the Tax Law of 1853 (Comp. Laws 1857, p. 317), and has been in existence ever since. What is new is not the law, but the criticism of the law.

The proceedings in the suit to obtain an order of sale are also criticised. The petition, it is said, states no facts. The court, if no defense is made, is required to make a decree, though it will have no judicial knowledge that a decree ought to be entered, and so on. How the Legislature, which is the only tribunal to which such criticism can properly be addressed, would undertake to answer or to obviate them we

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cannot say; but we doubt if that body would be impressed with their importance. It might well be asked, why should anything more be required as a foundation for the court's proceedings than the production of the tax itself? The taxpayer is informed by that exactly what claim is made against him, and the court is informed also. Words expended in a bill of complaint would be worse than wasted: they would only furnish opportunity for technical objections, costs and delays. The issue is made when the respondent presents his objections, and the Act contemplates an issue which is as simple as possible — one which any man, however ignorant, can understand. The Legislature would be very likely to believe that public policy required an issue of that sort. We have been tending towards simpler issues in all legal proceedings in this State, from the first, with the very best results; and the Legislature many years ago made it the duty of this Court from time to time to modify and amend the practice of the several courts of record, with a view, among other things, to the abolishing of all fictions and unnecessary process and proceedings; the simplifying and abbreviating of the pleadings and proceedings; the expediting of the decisions of causes; and the abolishing of all unnecessary forms and technicalities in pleading and practice. How. Stat. § 6409. Now what the Legislature has done in this case is directly in the line of what the law requires us to do, and is therefore in harmony with the public policy of the State as evidenced by its statutes. This being so, we do not see how we can refrain from saying that it is commendable, instead of being deserving of censure. The Legislature has required all that is necessary to enable the parties to try such legal questions respecting the taxes as may be raised, and anything more would be unjustifiable, because useless and tending to cause delay and add to the expense.

Many things which are said in this connection we abstain from any mention of, or at least from discussing, because we have been unable to convince ourselves that discussion is necessary. Much of it would be just as true and just as forcible if said in respect to an ordinary suit upon a promissory

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note as when said in respect to this proceeding. Let us see how that would be. A plaintiff files his declaration in assumpsit, attaching thereto what purports to be a copy of a note. Service is made on the defendant who fails to appear, and is defaulted. The plaintiff then moves for judgment, and takes it upon the default as matter of course. Execution follows afterwards as matter of course. In the whole proceeding the judge performs no function except to order judgment. Everything else is done by somebody else, and the judge, when he orders judgment, has no personal knowledge whatever, and no proof except the default, that any such demand exists as the plaintiff has counted on. The pretended note may be a forgery; it may have been obtained by fraud; it may be paid; if genuine it may be the note of some party besides the defendant. In respect to all these matters the judge is profoundly ignorant, and yet the ordinary course and practice of the court requires that he shall enter judgment. Why? Because the party defendant by neglecting to defend, admits the claim. This is the ordinary course in legal proceedings, and in strict analogy to those proceedings it has been provided in this tax law that decree for sale shall be made on default. There is nothing new or extraordinary about it.

Neither is there anything new or strange in the failure to provide for the making up of a formal record in the case. We have had no such thing as a formal record in this State since the statutes of 1846 took effect, and quite to the surprise of some persons who were educated to think that the old common-law formalities were of vital importance, we have found we get along just as well, and justice is just as effectually administered without the formal record as it before was when we had it.

We agree that lands of the United States or of the State cannot in general be taxed. When any attempt is made to do it they may well be left to make their own complaint. They are not complaining now. Neither is there any question before us whether taxing officers ought to go to the records to ascertain who are owners of the lands to be taxed.

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The law in this State has never required that; and if it ever should, it would thereby make an enormous addition to the labor to be performed by taxing officers and to the cost of taxation, and without, so far as we can perceive, any advantage whatever. Records in this State are not required to show the actual title, and if relied upon would be misleading in thousands of cases.

But all this discussion of the formalities of the judicial proceeding raises no constitutional question whatever. Perhaps we could have shaped the law more wisely; but what of it? Our business is judicial, not legislative.

VII. But a sweeping objection to the act is that the Legislature of this State has no constitutional power to provide for judicial proceedings for the purpose of obtaining an adjudication upon the taxes as a preliminary to a sale, and especially that it has no power to invoke the aid of equity for that purpose.

This objection has taken us by surprise. As our laws are founded upon those of England, where a court, which like our circuit court is both a court of law and a court of equity has immemorially existed, whose peculiar office it has been to assist in the collection of the public revenue, the natural inference would seem to be that similar assistance from a court, under proper legislative authority, would be entirely and unquestionably admissible in this country. And after the repeated declarations by this Court, that the Legislature of Michigan possesses all legislative power, to the full extent that like power is possessed by the Parliament, except as State and Federal constitutions have limited it, we suppose we may consider ourselves safe in assuming that it possesses the power to authorize this proceeding unless something in State or Federal constitution forbids. It is that something, then, that should be pointed out to us.

The argument against the power is based upon the proposition that the proceeding in equity to obtain an order of sale is really a step in the course of the executive business of levying and collecting taxes and therefore in this State—however it might be elsewhere—cannot be authorized, because it would be uniting the courts in the performance of executive

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duties, and our Constitution is peculiar in declaring a separation of the several departments of government.

In the proposition thus stated we think there are two errors, either of which is fatal to the argument: *First*, it is an error that the proceeding is executive; and *second*, it is an error that there is anything peculiar in the separation of departments by the Constitution of this State.

As to the first of these errors, we shall say only that if the proceeding in the assessment and levy of taxes were executive—which they are not—this proceeding in court would not be, for it has nothing to do with the assessment and levy of taxes. It takes place after the taxes are levied, after they have become a lien on the land and after the owner, if a resident, had become personally liable for their payment. The proceeding merely calls upon the court to order property sold for the satisfaction of a demand already fixed; and the power which the court is expected to exercise is exclusively judicial: it is of the same nature and has the same general purpose as the power the court exercises in rendering judgment in a common-law suit for taxes; the difference in the two cases being in the process which is issued to carry the judgment of the court into effect. In both cases the purpose is to compel the payment of taxes.

The second error will appear upon a comparison of the Constitution of this State with those of other states. The Constitution of this State provides that "the powers of government are divided into three departments, the legislative, executive and judicial. No person belonging to one department shall exercise the powers properly belonging to another except in the cases expressly provided in this Constitution." Article 3. These are very positive provisions; but instead of their being peculiar to the Constitution of this State, they are found either literally or in substance, in nearly every American constitution. Scarcely anything else is so invariably met with as this very provision. We make some quotations, selecting for the purpose states whose tax systems we shall have occasion to refer to further on.

In Illinois the provision is: "The powers of the govern-

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ment of this State are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Article 3. In California it is: "The powers of the government of the state of California shall be divided into three separate departments, the legislative, the executive and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted." Article 3. In Tennessee it is: "The powers of the government shall be divided into three distinct departments, the legislative, executive and judicial. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Article 2. The copying from other constitutions seems unnecessary. Thirty-one of the states have like provisions, and probably the rule which these provisions lay down is universal.

We deem it safe to affirm, therefore, that the Legislature of this State, in respect to providing for a proceeding of this sort, has all the powers which are possessed by the legislature of any other state in the Union, and that if similar proceedings have been provided for and have been upheld by the courts of other states, they constitute precedents which the Legislature of this State was justifiable in following. That such proceedings have been provided for elsewhere and sustained is well known. In Illinois a like system to that which this Act proposes to establish has been in force for many years; Tennessee has had and enforced such a system; and proceedings to which the same objection which is now made here would be equally applicable, have existed and been enforced in California, Pennsylvania and some other states at some periods in the history of their legislation. In New York it has long been the practice to have the taxes

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which are assessed for city improvements reported to a court for confirmation; and this instead of being thought an unconstitutional proceeding, has generally been deemed very proper and suitable; and a great number of cases appear in the books of reports in which questions of the regularity and validity of taxes were raised and discussed by able counsel; but we have no evidence that the point now raised occurred to them.

But much of the argument on this point is addressed to the fact that the proceeding which is authorized and which has been had, is in equity instead of in a court of law; and it seems to be assumed that equity has somehow been reaching out and endeavoring to draw to itself a jurisdiction which does not belong to it. Formerly, when courts of law and of equity were held by different judges, there was danger of such encroachments, and of unseemly controversies in consequence. But in this State where the same judge is both chancellor and common-law judge, the danger that in one character he will usurp from himself authority belonging to him in the other character, ought not to be very alarming. Still, so long as the distinction between legal and equitable proceedings is maintained, we concede that the judge as chancellor must not assume to exercise in that capacity the authority that belongs to him as judge of the common-law side of his court. And we think the people of the colony of New York were quite right in protesting against the establishment of a chancery jurisdiction in their midst without legislative permission. And in this case if this proceeding were not provided for by legislation, we should agree that equity had no jurisdiction. The fallacy in the case consists in treating this as a case in which equity is endeavoring to draw to itself a new jurisdiction, when in fact it is merely exercising a jurisdiction which legislation has imposed upon it. Equity has been passive in the matter except as required by the Legislature to act.

The question, then, is not whether equity can enlarge its jurisdiction, or draw to it new powers, but whether the Legislature is precluded from enlarging the jurisdiction or

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conferring new powers. If it is, what precludes it? What constitutional principle or provision stands as a barrier between law and equity to preclude the jurisdiction of one being enlarged at the expense of the other if the Legislature shall deem it wise? We know of none, and none is pointed out to us. On the contrary to set up any such barrier by judicial decision would be in plain disregard of the Constitution and of the will of the people as expressed in it. That will was and is, that the distinction between law and equity shall be abolished as far as may be practicable. When we say it shall not be, we set our will against the will of the people as expressed in the Constitution, and we cease to be guardians of the Constitution in its integrity, which courts are supposed peculiarly to be, and become impediments to its full effect.

As something is said about the incompetency of courts to exercise prerogative powers, as being a reason why they can take no part in enforcing the revenue laws, it is pertinent to remark that any argument respecting prerogative powers, drawn from English precedents and analogies, unless they be very modern ones, has very little application to anything in this country. The king had many prerogatives, and the revenue of the kingdom was supposed to be the king's revenue; but Parliament has for a long time been taking to itself his prerogatives, and has especially taken control of the general revenue. There is not a recognized principle of the British constitution to-day which would preclude any court of the realm being made an active instrument of collection of the revenue if Parliament shall will it. But in this country ever since its independence prerogative powers have belonged to the people, and the legislature as the immediate representative of the people has determined how they shall be exercised. The legislature must determine it, for there is no other competent authority. It is certain the courts cannot do it; and it is equally certain that the executive cannot. The Governor of our State has such powers as the Constitution confers upon him and no others. There are no powers which he can take by implication except they be incident to

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those expressly conferred. *Field v. People* 3 Ill. 79, 80. But as we have already said, it is a fallacy to assume that duties under tax laws are executive. They are administrative duties, which under the most complete separation of executive, legislative and judicial duties by the Constitution, would require legislation to determine what officers or what agents should perform them. Some of them—as for example, the valuation of property—are quasi judicial; but the courts could not for that reason claim them as pertaining to the judiciary. Others—as for example, the collection of taxes—are quasi executive; but the Governor could not for that reason claim them for himself or his subordinates. No officer and no department could claim them except under and in accordance with legislation; and the Legislature might very properly make use both of the executive and the judiciary, or it might with equal propriety create agencies not assignable to either department. If the duties become executive or judicial, it is because the Legislature has made them so.

We have not specially referred in this opinion to the peculiarity of this proceeding as one in rem or in personam, because we have not deemed it important to do so. The proceeding is in fact what the law makes it, and needs no classification by common-law terms. Taxation of property is essentially an ex-parte proceeding, and a proceeding against the thing itself; and the notices required in the course of the proceedings are given for the most part by publication. We should agree that the officers could not carry this proceeding into court as a proceeding in rem without legislative authority, but we look in vain for any constitutional restriction upon legislative authority to permit it, or for any that would preclude the Legislature providing for the judicial proceeding the customary notice.

It is probable that when the Legislature provided for the proceeding now in question it did so because a court of equity has always been deemed the most fitting tribunal to invoke for the enforcement of liens. The Legislature when making provision for builders' liens referred their enforcement to equity as matter of course. And if it has less power to pro-

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vide for the enforcement of one kind of lien in equity than for another, we do not understand why. The suit provided for is nominally in personam, but all such suits are mixed suits, and when as frequently happens personal service cannot be had, the suit proceeds as one essentially in rem.

That other states require judicial orders for sales in tax cases has been mentioned. How does it happen that the Legislature of Michigan possesses less power than the legislature of Illinois or Tennessee or any other state? What has emasculated it, and when did the process take place? But Congress also makes provision for a similar proceeding to that now under consideration. It not only makes provision for judicial proceedings to enforce the lien of the United States for taxes, but it directs them to be had in equity. Rev. St. §§ 563, 3207 et al. There can be no claim or ground for claim that Congress has greater powers in this regard than the state legislatures have. If this act is unconstitutional, so is the legislation of Congress.

This Court has held repeatedly in a series of cases beginning with *Scott v. Smart's Ex'rs* 1 Mich. 295, that it will not declare a statute void on constitutional grounds unless the conflict between the law and the Constitution is plain. If the point is in doubt, the Court will defer to the legislative judgment and sustain the statute. If the carefully prepared judgment of an able Commission, based in its essential features upon systems long in existence in other states and under the Federal government, and therefore having the approval of the legislatures of those states and of Congress, and specially approved in this State by the two houses of our own Legislature and the Governor; if this with its sanctions is not sufficient to raise very serious doubt of the correctness of an adverse view that brings and can bring no direct authority to its support, and is based in the main on theoretical reasoning,—then it would seem plain that the Legislature can never, by any care, guard against its action being set aside as unconstitutional, unless indeed the proposed work is submitted to the court in advance, and its opinion obtained upon it. But even that could be no safe reliance, for courts change in

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membership, and the same members may change their opinions.

VIII. Utterly disclaiming as we do any right to pass judgment upon the wisdom or policy of this revision of our tax laws, we have not thought it improper to look at the records of the Auditor General to see what have been its practical workings. Some of the figures in that office illustrate the workings of the new law in a very striking manner. The number of descriptions of land on which the taxes remained unpaid when the time came for advertising the first year under the new law was 19,871 less than the preceding year. This will give us some idea how large is the number of persons who have been accustomed to let the taxes go unpaid on a calculation that by delay and litigation they could avoid payment altogether. The amount charged against the lands struck off to the State that year was $73,238.84, while for the preceding year it was $412,184.68; a gain to the State of $338,945.84 in the burden which that portion of its citizens who are accustomed to pay their taxes must carry. This will go very far towards overcoming the abstract and speculative objections which are made to the law. We learn in the same office that the objections made by land-owners to the practical operation of the law are mainly to the great stringency of a few of its provisions, and these might easily be altered by the Legislature so as to obviate the complaints if they should seem to that body to be grounded in reason. We have no right to assume that the Legislature will not redress any real grievance when it is pointed it. And no evil in government could well be greater than for a court to stretch its constitutional authority in order to limit, as a remedy for possible evils, the constitutional authority of another department.

The proceedings should be affirmed.

CHAMPLIN, J. concurred.

CAMPBELL, J. Defendant demurred generally to the proceeding in the circuit court for the county of Marquette to procure a decree of sale in equity for taxes levied against defendant's lands in that county. The demurrer rests on con-

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stitutional grounds. It is claimed by defendant that the whole tax law of 1882 is invalid. It is further claimed that so much of it as provides for a judicial decree and sale is invalid on special grounds, whether the rest of the statute is good or bad.

The first objection, which goes against the whole statute, is that the Legislature exceeded its powers in admitting the Tax Commission to exercise legislative functions in both houses.

The statute of 1881, under which they acted, provided for five commissioners who were to be appointed by the Governor and confirmed by the senate, to prepare and report a bill for the assessment, levy and collection of taxes, to be submitted to the Legislature at a general or special session. This statute provided that the members of this Commission should be entitled to seats upon the floor of the senate and house for the purpose of explaining the provisions of such bill, and should remain in attendance until its passage or final disposition; and it was further enacted that "no amendment shall be made in either house until after the same shall have been proposed and submitted to the said Commission, for at least twenty-four hours, or until they have an opportunity to report to the house in which such amendment originated their views in relation thereto." Laws 1881, p. 146.

In pursuance of this law the Tax Commission prepared and reported a bill, and a special session of the Legislature met in 1882 to consider it. It was passed March 14, 1882, and ordered to take immediate effect. It contains no express repealing clauses, but a separate repealing law was a part of the same scheme and passed at the same time purporting to cover the previous general law and several special laws on the subject, with saving clauses as to rights under them. Although separate in form the two belong together.

During the pendency of this legislative business the Commission sat with the Legislature, debated the bill and the various matters brought up in the two houses concerning it,—in some instances induced an abandonment of action contemplated, and had all amendments referred to them and gave

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their views on them before the several houses considered them.

It is not claimed that it was not competent for the Legislature to employ a commission to prepare and report a tax system, with such expression of views as they might choose to make. But it is claimed that their functions could not lawfully be enlarged so as to allow them to join in legislative discussions on the floor among the members, or to restrict the ordinary privileges of members to offer and discuss amendments to legislation without the interference of persons who were not members of either house.

It is very well settled that a legislative body cannot delegate any legislative powers, except to such corporate bodies as are authorized to regulate their own local affairs. It is similarly true that no public body or officer can admit others to a share in official discretion. And the present case certainly presents a close resemblance to cases where proceedings have been held improper by reason of the interference of unauthorized persons. The legislative power in its ultimate exercise no doubt gets expression by the vote cast for any measure. But the object of having legislative bodies meet publicly is to secure argument and deliberation among those who are to have the responsibility of voting, and who in this State must have their several votes entered of record by yeas and nays. There are several constitutional clauses bearing in the same direction. No member can be questioned elsewhere for what he says in debate. Every law is to be read three times before its passage. No new bill can be introduced after fifty days. All amendatory laws must set forth the entire section as amended. All these provisions are meant to arrest attention. There has never been any doubt about the importance of discussion in the work of legislation. And while light may be had by individuals from any source where they choose to seek it, and while every member is subject to the criticism and opposition of any of his associates, it is nevertheless well understood that the discussion on the floor should come from those who have constituencies to represent, and responsibility for all that they say. The Governor has

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the right to object to a bill after it has been passed, but this must be in writing, and it would not be tolerated that he should come upon the floor during a session and dispute with members, although he shares their responsibility and is supposed to be informed.

The power of the Lieutenant Governor to debate is expressly given, and confined to the session in committee, but he also has a vote in case of a tie, and he acts under constitutional authority. But no other State officer has any right upon the floor. Even in England, where cabinet officers have seats in Parliament, it is only because they are elected as members of the lower house, or belong to the peerage. They cannot speak except as members. It may very well be that there are many persons who on special subjects could enlighten a legislative body; but if the public law puts this function upon the members themselves, it contemplates that the preparation for voting on which the result of a vote must always depend, shall be confined to the members. Each legislative house is supposed to be, above all other things, a deliberative body acting on the conclusion of its own deliberations. If it is competent to admit one set of men, it is just as competent to admit others; and if it is lawful to tie the hands of members and of the houses until this Commission had deliberated, it might just as well be done in any other case and with any other person or body.

The rule which has held action invalid when shared by unauthorized persons, is not confined to their votes. An intruder in the room of either a grand or petit jury need not vote, in order to invalidate their acts. If a disqualified person sits in a board of magistrates or commissioners, it is presumed that his views may have affected the result. *Reg. v. Justices of Suffolk* 14 Eng. L. & Eq. 90; *Reg. v. Justices of Hertfordshire* 6 Q. B. 753. And it is easily to be seen that the presence and influence of men of recognized eminence might operate with some effect to prevent modest men from expressing their views in opposition to their arguments or opinions.

In this instance the commissioners had every power given to any member except that of voting. They had the power

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which no member possessed, of speaking in both houses. And they had the further power, beyond that vested anywhere else, of stopping action on any amendment until they had first had a chance to consider it. It is difficult to see why their functions did not embrace the most important part of legislative business, which is preparing the minds of the house by persuasion and argument to vote upon such measures as they favored. And as the journals show very conclusively that the legislation in question was actually influenced by their intervention, the question is very distinctly presented whether this was lawful.

It seems impossible to avoid the conclusion that so much of this statute as brings in substantial innovations upon the old system which it was meant to displace is directly to be traced to this influence. But in the case now before us the most important question raised relates to the proceedings after return to the Auditor General's office, and the two parts of the statute do not rest on the same grounds. Up to the return to him the action is confessedly of an administrative character, and if otherwise regular might be ratified, if now deficient, by future legislation. It is, although different in some respects, substantially in harmony with the former tax laws and introduces no new principle. But the proceedings to bring lands to a sale, after they have been returned to the Auditor General, are so vitally changed as to form an entirely new scheme. If this law is enforced according to the theory of its framers, the work of the administrative department ceased when the time for payment without charges ran out, and the judicial department intervened to complete it. As to the former the difficulties need not interfere with saving the taxes. If the judicial proceedings are invalid the Legislature, having no judicial power, cannot mend them.

We may therefore confine our attention to the validity of the proceedings more immediately involved. If the defect already alluded to were the only one alleged, provision might be made for selling these lands by future proceedings of a similar character. But it is claimed that the so-called judicial

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scheme provided for is subject to objections which no legislative action could overcome, and is in itself a violation of constitutional requirements and guards. As it is very peculiar, and in some respects, so far as we are informed, entirely original, it is important to understand its precise course, which may be briefly stated.

After the taxes have been returned uncollected to the Auditor General, and have remained in his office until the first day of July in the subsequent year, he is required to prepare a book for each county, in which each parcel of land is set out, and opposite each parcel is to be set an aggregate sum which is made up by adding together all of the taxes returned against it with interest up to the first Monday in the succeeding May, and sixty cents additional on each parcel for expenses. The same book which is intended to have the entire record in itself is to have other parallel columns for inserting various memoranda as to future payments, sales, redemptions and court orders. In this book which, when prepared, contains these two entries of description and of the aggregate sum demanded, the Auditor General is to insert a brief petition addressed to the circuit court of the county, in chancery, containing no averments, but merely referring to this schedule of lands and amounts, and praying "a decree in favor of the State of Michigan against said land for the payment of the several amounts so specified therein, and in default thereof that such lands be sold." This petition is to be signed but not verified. The statute goes on to say that it "shall be deemed equivalent to a bill in chancery to enforce the lien for such taxes, interest and charges, averring their validity, that they have not been paid, and praying for a sale to pay such lien." This is to be filed in the county clerk's office as soon as practicable after the first of July.

The Auditor General is required to publish a copy of this petition and schedule once a week for three weeks before the time which he, and not the court, fixed for hearing, and with it a notice that the petition has been filed claiming a decree against each parcel for the sum therein specified, and that it will be brought to a hearing at the next term of the court

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at a time and place specified, and "that all persons interested in such lands and desiring to contest the lien claimed thereon for such taxes, or any part thereof, shall appear in said court and file with the clerk thereof their objection thereto on or before said day, and that in default thereof a decree will be taken as prayed for in such petition." In the same notice he is to state that on the first Monday of May next thereafter, the lands described in the petition and ordered sold will be sold at some convenient place in the county named.

The statute provides that the publication of this notice "shall be equivalent to personal service of notice on all persons interested in the lands specified in such petition, of the filing thereof, of all proceedings thereon and of the sale of the lands under the decree, and shall give the court jurisdiction to hear such petition, determine all questions arising thereon, and to decree a sale of such lands for the payment of all taxes, interest and charges thereon. The circuit court in chancery shall have jurisdiction to hear, try and determine the matters alleged in such petition, even though the amount involved therein be less than one hundred dollars."

This publication is to be made in such county paper as the Auditor selects, or in any other county if there is no county paper, or paper in an adjoining county properly qualified, or if it will not do the work.

No particular time is fixed for beginning this publication, and no particular term is required, except so far as may be inferred from the requirement that the decree of sale shall be as much as ten days before the appointed day of sale, on the first Monday of May. In most counties more than one term would occur in this interval. If no decree is made, then the Auditor is to re-advertise in the same way as soon as he can. In the present case the papers were not filed till January.

Parties desiring to contest must file specific objections before the day fixed, and are confined to them; but may on showing within five days that they have been prevented without their fault, be allowed within the next five days to file such objections. The court is required to proceed sum-

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marily, giving precedence to the tax matters over all other business. "The taxes specified in the petition shall be presumed legal and a decree be made therefor unless the contrary is proved." All evidence is required to be taken in open court, and oral evidence may be taken down and filed if desired. The court is to determine the admissibility of all evidence, and the decision so made is final, and not subject to review or appeal.

All orders relating to any land are to be made by a "brief entry" in a column of the book before referred to, opposite the parcel, signed by the judge by his name or initials, and this is to have the same effect as if made and entered as part of the final decree. The total amount of taxes, interest and charges allowed by the court is to be entered in that book by the register opposite the land in a parallel column.

The final decree is that the amounts set down in that column in the book are valid, and a decree is granted for such amounts, and for a sale of so much as shall be necessary to satisfy the same, and that all orders entered in said book are made a part of the decree with the same effect as if entered therein. This decree is the only thing entered in the chancery record of the court, and requires the aid of the tax-book to show any of the matters desired.

As soon as made, a copy of this decree is to be annexed to the book, and then such tax record is to be delivered to the county treasurer, and required by the statute to remain in his office except as it may be needed in the clerk's office.

No one can appeal against any decree allowing a tax, unless within ten days after the date of the decree he pays the amount to the county treasurer, and within twenty days from such date of entry files a proper bond for costs. Either the county treasurer or Auditor General may direct an appeal on behalf of the State. "Such decree shall be considered as a several decree in favor of the State of Michigan against each parcel of land for each tax included therein."

On the first Monday in May the county treasurer is to begin the sales and continue them till completed. The sale

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is to be at some convenient place at the county seat to be selected by the county treasurer. Section 63. This provision is not quite in harmony with a previous one in section 55, requiring the Auditor's notice to specify the "convenient place in the county" where the sale will be made. And the law is also inconsistent in providing by section 78, that unless satisfied with the county treasurer's bond, the Auditor General may appoint any one else to make the sale. The law contains no provision for reports to the court by any one but the county treasurer, or for giving credit to the acts or statements of such appointee of the Auditor, who has no power to appoint men to public office, and whose employees are not made public officers.

Within twenty days after the first Monday in May the county treasurer is to file with the clerk a report of the sale, referring to the tax record for the particulars. The sales are entered in this same record opposite the various parcels of land. All sales stand confirmed unless objections are filed within eight days, with no further ceremony. When confirmed the sales are reported to the Auditor General, and he is to make deeds. The law declares that "such deeds shall convey an absolute title to the land sold, and be conclusive evidence of title in fee to the grantee," subject only to subsequent taxes. The court is authorized to put purchasers in possession by writs of assistance.

These are the provisions generally applicable. There are some special provisions which do not affect any principle involved in this inquiry.

Such being the statutory provisions which are intended, as the State claims, to create the effect of decrees and sales in equity, some reference to the differences which appear at once on examining this scheme will be necessary to aid in determining how far such action is entitled to respect as involving the exercise of lawful judicial powers.

No tax can be levied and none is sought to be levied, on any lands that do not belong to private owners. Lands of the United States, or of the State, or of its municipalities are not taxable. The land is taxable and is taxed solely

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because it is private property. And this condition existing, the taxing officers always have the means of knowing where the record shows the title to remain as assessed. There is no jurisdiction to tax land merely because it is in the State. It must be private property. And every tax is made a debt against the person assessed.

This statute does not seek to charge several individuals as interested in one common fund, or subject to a joint or collective burden. Each parcel of land is kept distinct from all the rest, and as to each the proceeding is a several proceeding. Against each lot is charged an aggregate sum which includes all the unpaid taxes ordinary and special, local and general, that have been returned against it. The taxes were all laid and apportioned in the early stages of the work while in the hands of town officers. If objections exist they may or may not be confined to a single lot, or to single taxes; or to single townships or wards. The case stands as to each precisely as it would if no other lands had been returned charged. The percentage in two towns can seldom be the same, and there may be differences in the taxes themselves.

But there is nothing on the face of the petition and record from which the court called on to act can derive any information. All that the court knows is that as to each parcel the Auditor General asserts a certain aggregate of taxes stands returned. The record does not aver or show of what items these taxes consist, or for what purposes they were levied, or on what valuation they rest, or whether they include all or only a part of the whole taxes assessed. While, in order to make any tax valid a series of consecutive acts must have been performed according to law, the petition avers none of these, and refers to no documents or facts to sustain them. And the statute, except in cases where parties see fit to come in and raise objections, neither requires nor permits the court to inform itself concerning these matters. And when parties do appear, it makes every assumption against them, and lays down the rule, contrary to every doctrine of jurisprudence, that it is not for a plaintiff to aver the facts necessary for his right, or to prove them; but that the defendant must in all

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cases show a defense and be presumed to be in the wrong until he does so. The law makes no exceptions in favor of persons under disability from age, absence or any other cause.

All the intelligent functions which, in the case of parties not appearing, are performed by any one, are performed by persons distinct from the court. The judge has no judicial action whatever to perform. The Auditor General, who represents one of the parties, selects his own time out of several possible terms for filing the tax-book and chooses his own paper to give notice in, and designates the time of hearing. When that time comes all private business must give way, and all suitors stand aside until the tax cases are heard. If no objection is filed as to any parcel the court cannot examine whether it should be bound, but must decree against it at all events. If on the other hand a defense is put in, then the defendant has no protection against such rulings upon testimony as may cut off altogether such defense as he rightly possesses.

Although every court of equity is a court of record, and its proceedings must, according to the essential constitutional meaning of the term, appear in its own files and entries, there is in no case under this law on the court records anything to show what the court had jurisdiction to do, or what it has done. The whole court action appears in the book entries, and nowhere else, and this book belongs in the custody of the county treasurer. It is this officer and not an officer of the court, or one who is subject to its direction, who makes the sale under conditions not imposed by the court, and who is in no way responsible to the court for his doings on the sale or his dealings with the funds. And when he reports the sales, which he does merely by reference to his own entries in the record-book, he gives no facts or information whereby the court can know whether or not he has acted legally, and unless exceptions are filed, the confirmation is of course. In other words the conclusive effect of a decree and of a regular sale confirmed under it, is given to an ex-parte proceeding in which the court has never been consulted, has never had the power or right even to form an opinion, has

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issued no process, has exercised no judgment and has possessed no control. Moreover it has had none of the powers which are inherent in every tribunal acting judicially of preventing the parties from being deprived of rights by accident, ignorance or misconduct of others.

If such transactions have anything in common with the essentials of judicial action it is very difficult to find it. If the law were to allow a private person to join all his causes of action against several hundred persons in one proceeding, bring them all in by one published notice in any paper he may select, and compel them all to have summary judgment against them unless they should prove their innocence, the result would be analogous to this, except that this has further defects.

But the constitutional questions perhaps require more definite reference. So far as the argument went, there was no precisely analogous practice to the present brought to notice. But, after all, the matter must be determined by our own Constitution as read in the light of our own system, into which it was made to fit. The question is not whether the State may not use summary and strong means to collect its taxes. It has ample power to do this by proper executive methods. It is whether, when it undertakes to call in the aid of judicial proceedings, it can call that judicial which is not judicial, or bind persons or property without any regard to the rules of jurisprudence.

The constitutional rule which gives a right to due process of law covers property as well as personal rights and obligations. It has always been invoked as protecting men from being robbed of their freeholds. And undoubtedly, as has been decided frequently, it does not require that the courts shall intervene in any of the stages of taxation. On the contrary it is well settled in this State as well as elsewhere that taxation and its methods are prerogative and not judicial, and that courts cannot assume or exercise the functions of taxing officers. They cannot use their own discretion to correct the discretion of executive officers, and they cannot on the other hand be deprived, in the exercise of judicial power,

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of the right to form their own judgments. Nothing can be a judicial act in which the judge has nothing to decide. And it must not be forgotten that whatever judicial power exists at all, is by the express terms of the Constitution of Michigan vested in the courts and cannot be taken away from them, while that which is not judicial they are as expressly debarred from exercising, and it must be vested elsewhere. Our Constitution is peculiar in prohibiting one department from using the powers of another. It is not in the power of the Legislature to make that judicial which is not so by nature. See *Aud. Gen. v. Pullman Palace Car Co* 34 Mich. 59; *Ambler v. Aud. Gen.* 38 Mich. 746; *Perrine v. Township Board of Hamlin* 48 Mich. 641; *Whitbeck v. Common Council of Hudson* 50 Mich. 86; *Supervisors of Midland v. Aud. Gen.* 27 Mich. 165; *Ayres v. State Auditors* 42 Mich. 427.

It is solely on this principle that proceedings to levy and collect taxes have been generally if not uniformly held valid without that same kind of process of law which is requisite in judicial proceedings. The collection of public revenue is necessarily by non-judicial action, and if that action is regular and not in disregard of legal requirements it is binding on every one. But inasmuch as there is no judicial action in its proper sense, it has always been held that it was not competent for the Legislature to make such action as against taxed property conclusively regular and sufficient, although prima facie presumptions may be permitted. It would be absurd to require due process of law as a constitutional right, if the Legislature could make irregular process valid by declaring it entitled to conclusive presumptions of validity. Constitutions would be useless if such a course could be maintained. There is no question but that whatever absolute rights exist have a claim to judicial protection in some form, and when a man's freehold is sought to be charged or wrested from him, he must have a right to test the legal sufficiency of the proceeding under which it is attempted. A judgment lawfully rendered ends the controversy, but nothing else can. And it is undoubtedly in view of this principle of the force

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of judgments that the present statute was passed, which aims to make a judicial proceeding of what was never in this State regarded as such before, while at the same time it discards the essential conditions of jurisdiction.

From the time of the Territory down to the passage of the present Constitution the laws have always provided that after taxes have been returned to the Auditor's office he should in due time advertise them for sale by the county treasurer or some substitute. The law has always empowered him at any time before sale, and sometimes thereafter, of his own motion, or on complaint of land-owners, to set aside illegal taxes on any ground which could be recognized by a court as ground of illegality. This inquiry, involving chiefly an investigation of matters of record, has been uniformly treated as non-judicial, for otherwise it could not have been carried on except by a court, in which all judicial power is required by the Constitution to be vested. On setting them aside he could do what the law allowed to charge them back, or otherwise protect the public interests. And no court has ever interfered to review such action, as it might do by certiorari if judicial. On the contrary when sales have been threatened for illegal taxes, they have been restrained by injunction as wrongful attempts by an executive officer under color of office, and not as the acts of an inferior judicial body, to be reviewed by appellate action.

The power vested in the courts of equity under this statute must necessarily be tested by its effect, where no one appears. If the court has no jurisdiction non-appearance waives nothing. If the court has jurisdiction, non-appearance cannot prevent a binding judgment, and the court can render it. As already pointed out the court here, in case of non-appearance, has nothing to do which might not just as well be done by its clerk, or by any one else. The statute is peremptory. The court has no means of knowing whether any or, if so, what taxes were ever levied or returned, or whether valid or invalid. It seems a little absurd to speak of this as judicial. There can be no judicial proceeding in any other case without such an averment of facts as will enable the court from

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the facts to draw a legal conclusion. But here nothing is averred that leads definitely to any conclusion. It has always been competent, at law and in equity, to take the judgment of an appellate court upon the sufficiency of the record to maintain a judgment, and it is always a sufficient objection that facts are not averred. The return of lands may be valid and may be invalid, and this return is the only fact apparent. And it is equally necessary to the existence of a general court of record that it may control the course of its own business, oversee or regulate the execution of its own process, relieve parties against defaults, grant new hearings and secure justice. A court that has no discretion whatever of this sort would be an anomaly.

There is another peculiarity which distinguishes these from judicial proceedings. They cannot be continued from term to term until they are all finished. The statute provides that if for any reason no decree is rendered, or none as to any part of the taxes, a new petition must be filed and the whole process gone over again. See section 60. A judicial proceeding which is to be regarded as a suit in equity, cannot drop in this way. When a court of equity gets jurisdiction it keeps it.

The statute really makes this proceeding a mere intervening step in the course of the executive business of levying and collecting taxes in which the Auditor General is the only person invested with discretion, and in which he determines how and when the matter shall get into court, and gives notice of the sale before the court has been called on to act. The record is kept in an executive office; the time and terms of sale are fixed by statute, and with the single exception of the case where objections are filed there is no investigation. And in the case of infants who are under the peculiar protection of the court, and of absentees who are never decreed against without proofs, there are no means provided for discrimination. All are under the same rule and bound, if at all, by the same constructive service.

If the powers exercised by the circuit courts under this statute differ from those formerly exercised by the Auditor

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General, it is not because the inquiries are different in kind, but only because they are narrower and not wider than his. He could always determine all that the court determines, and whatever further force is given to the conclusion here, is given by the statute itself.

It was further claimed, however, that even if this procedure which has always heretofore been treated as prerogative, can now be regarded as judicial, it is still void—*first*, because undertaking to bring into equity what is not equitable; and *second*, because it undertakes to reach parties without lawful process.

In all tax proceedings there is room for controversies which belong to courts of law. Whatever presumptions can be allowed in favor of the sufficiency of proceedings not judicial, they cannot be conclusive. There are constitutional and other conditions concerning taxation which the courts are bound to enforce. If a tax deed was issued under any of our previous laws, its validity was always open to attack before a jury. And it has been held repeatedly that equity cannot of its own motion or by statute step in and litigate tax titles where the questions can be tried at law, as they always can be if the claimant against the tax title is actually or constructively in possession. *Blackwood v. Van Vleet* 11 Mich. 256; *Tabor v. Cook* 15 Mich. 322; *Torrent v. Muskegon Booming Co.* 22 Mich 21.

And it has also been held, on the same principle, that although partition is one of the ancient and ordinary subjects of jurisdiction in equity, yet a disputed title must nevertheless be tried at law. *Hemingway v. Griswold* 22 Mich. 21; *Phelps v. Green* 3 Johns. Ch. 302.

It is undoubtedly true that this statute undertakes to avoid this difficulty by having the validity of the tax determined before the sale and not after. If this power exists there could never have been any reason why, without a statute, a separate chancery proceeding against single parcels of land, in the ordinary form of a bill could not have been filed. There can be no power in any legislature to change the nature of equity, and draw to it a jurisdiction not warranted by legal

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principles. But no one ever imagined that a court of equity had any more power than any other court to intervene to aid taxation. Having always provided that a sale for taxes should not be a judicial sale, and needed no decree of a court to authorize it, it cannot very well be now claimed that equity has any greater power than it had before, to take part in proceedings that neither begin nor end in a court, and that are never from beginning to end under the control of a court.

Constitutional rights are not subject to any such juggling process. If they can be evaded as readily as this process would enable them to be evaded, it is impossible to say what rights would be left at all. Courts are bound to look at substantial rights and see that they are maintained.

The jurisdiction of equity, while very valuable in its place, is one which has always been regarded as not open to enlargement for new cases not covered by old principles. Under the British constitution the king was reckoned as the fountain of justice, and had unlimited power to create new courts. But it was held to be contrary to the Great Charter to create a new court of equity, or to provide that an existing court should exercise a new equitable jurisdiction. Com. Dig. "Chancery," A 3; "Prerogative," D 28, and cases cited. The authorities referred to declare his inability to authorize any court existing or newly created to entertain any new jurisdiction which does not preserve the common-law right of trial by jury. And even in the summary exchequer processes, which although conducted by a court were prerogative in their nature, there was always at some stage a right to a traverse and jury.

In New York the power, without legislative consent to create a chancery jurisdiction in the colony, was vigorously resisted. 1 Hoff. Ch. Pr. 13, 14. And the action of the early Congresses, which has in this country always been regarded as a proper exponent of the rights afterwards secured by constitutional provisions, condemned as entirely illegal and contrary to the Great Charter all of those expedients resorted to by Great Britain to deprive parties in revenue as well as in other cases, of resort to juries. When we find

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in a constitution the retention and assurance of this right, it cannot be claimed that it is to be made subordinate in any way to any legislative power to destroy it under color of new remedies.

The only ground on which this jurisdiction can be plausibly based is that equity has power to entertain proceedings in rem, and that as to such proceedings no process is required beyond some general notice, which need not be brought home to any one.

For this there is not a shadow of authority that could avail here. The proceedings in a court of equity have always been in personam, and it is only in very modern times that decrees could be enforced except by attachment. In this respect there has never been any distinction between law and equity. The whole theory of both has been that the property of any defendant could only be reached and bound after he had been properly warned to appear. And there has never been any exception to the rule that no one could be lawfully summoned into court without personal warning, unless it was impossible to find him where he could be summoned. So far as liens are concerned, instead of it being the rule that equity can enforce them, the rule is nearly universal that it cannot. The liens which equity enforces are almost without exception those which it has been enabled to bring within its jurisdiction by some theory of equitable interests analogous to the various mortgage rights, or coming within the category of equitable interests. It is undoubtedly true that it has expanded its list of equities in that direction, and that mortgages and quasi mortgages are numerous. But no one ever contended that a statutory lien or charge not springing from contract relations could be treated as an equity, or that equity could deal with it on equitable conditions. It is a purely legal right, and equity must always so regard it.

It needs but a little consideration to see that if the existence of a lien can enable equity to draw the controversy into its own charge and dispense with process it would not be difficult to wipe out most legal rights. It is common in some of our states to allow lands and other property to be attached

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in advance and held liable for such judgment as should be thereafter rendered. There are many classes of laborers and others who have liens on property in their hands for various purposes. There are multitudes of liens on maritime property. But it has not been imagined that these liens in any way affected the nature of the controversy as legal or maritime, or that the fact that property was held for ultimate satisfaction gave equity any control over it.

Still less has it ever been held that a party who would otherwise be entitled to personal notice could be deprived of that right by seizing his property, or by placing liens upon it. The analogies of admiralty have never been extended. That jurisdiction was recognized as already existing when this country was settled, and at the early period when it was fixed it was not within the power of any court of common law to deal with maritime or foreign interests at all. The jurisdiction once fixed, whether wisely or unwisely, was no violation of the common law, and so far as any change has taken place, it has been by enlarging the office of the common law so as to cover all personal actions, sometimes concurrently and sometimes exclusively. And while the present course of decision has attributed to the admiralty jurisdiction over waters not formerly supposed to be under it, yet these decisions have all gone upon the ground that the Constitution itself so extended it. The idea that Congress or the courts could enable it to trench on the common law has always been repudiated. It is the common law that is favored, so that equitable rights may be enforced by it where practicable, as it often is.

The necessity of personal service where attainable, has been recognized in all of our courts by decisions which would be entirely wrong if other notice would be available. The statutes authorizing publication against absentees have been treated universally as in derogation of common right, and as requiring strict construction, although no personal decree can be made under them, and nothing is bound but the property in litigation. They are treated as substitutes for the old and tedious processes of sequestration and out-

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lawry, and as harsh and only justified by necessity. Nothing short of a full compliance with the statutory conditions saves such decrees from being held absolutely null and void. A failure is not treated as merely irregular. *Platt v. Stewart* 10 Mich. 260; *King v. Harrington* 14 Mich. 533; *Soule v. Hough* 45 Mich. 418.

It has also been a settled rule, which would be senseless if complainant's theory is correct, that no decree can be taken on the merits on the mere default of a person not served personally. Our own statutes have introduced no new rule in requiring full proof in all such cases. *Brown v. Thompson* 29 Mich. 75; *Williams v. Corwin* Hopk. Ch. 471. And where there are no facts distinctly alleged, but merely inferentially, it is questionable how far a pro confesso would in any case authorize a decree. The general rule is that nothing is admitted that is not well pleaded. Id. So it has been held in this court that an infant is not bound by a decree which is rendered without proof. *Chandler v. McKinney* 6 Mich. 219; *Smith v. Smith* 13 Mich. 262; *Ballentine v. Clark* 38 Mich. 396.

It is further to be noticed, as previously suggested, that under this statute the decision of the circuit court on testimony is final and cannot be reviewed on any process. By the Constitution the Supreme Court is given supervisory power over all other courts. This must be exercised in accordance with the nature of their jurisdiction, but it cannot be taken away. The only and immemorial method of reviewing cases in equity is by appeal from the final decree. Appellate power beyond this is not uniform. But the chief criterion to determine what action of the court of chancery is equitable, and what part special or prerogative, has always been whether an appeal lay to the House of Lords. *In re Lanesborough* Lloyd & Goold 503; *Ex parte Shaw* Beat. 33; *Kennedy v. Earl Cassilis* 2 Swanst. 326; *Ex parte Bryant* 1 Ves. & B. 211; *Oxenden v. Lord Compton* 2 Ves. Jr. 72; *Rochfort v. Earl Ely* 1 Brown Parl. Cas. 450; *Sheldon v. Aland* 3 P. Wms. 108, note; *Saul v. Wilson* 2 Vern. 118; *Ex parte Phillips* 19 Ves. 122; 3 Dan. Ch. Pr., ch. 28, § 3, p. 1633 et seq; *Teynham v. Lennard* 1 Brown Parl. Cas. 544;

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2 Story's Eq. Jur. § 1335; 2 Fonb. Eq. 225, and notes. This subject was referred to somewhat in *Cady v. Knit Goods Mfg. Co.* 48 Mich. 133.

The essential importance of an appeal in equity is that there may be a full rehearing in an appellate court, and that nothing shall be done in the court below which shall affect the merits without appellate redress. Even at law a bill of exceptions will bring up all rulings upon testimony. The exclusion of testimony may be very easily the destruction of a case or defense.

The statute has left no doubt as to the nature of the proceedings as it is intended to have them operate. Each parcel of land is not only to be charged with a tax, but the decree is to be the foundation of a conclusive title. The petition is declared to be, while it practically avers nothing, "equivalent to a bill in chancery to enforce the lien." The decree is to "be considered as a several decree in favor of the State of Michigan against each parcel."

The case cannot be changed in character by the fact that a hundred or possibly a thousand suits are consolidated. They are all in fact and are all meant to be distinct controversies with each land-owner. If only one tax remained unpaid the proceeding would be the same. The vital mistake is in attempting to turn into an equitable proceeding that which is not in its nature a judicial or equitable matter, and then to avoid compliance with the rules of universal jurisprudence, because by reason of this very error it is found difficult to do what law and justice require as a condition of jurisdiction.

If there were occasion to consider the notice itself, there would be some difficulty in treating it as adequate. In the long interval between July first and the succeeding May there is usually more than one term, and no one could be informed without continued vigilance when his objections could be filed. But this sort of notice cannot serve as ordinary process in equity.

The demurrer should be sustained and the proceeding dismissed.

SHERWOOD, J. concurred.

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[In the Matter of the Petition of the State of Michigan for the Sale of certain Lands for the Taxes assessed thereon.]

Appeal from Wayne (Chambers, J.) Apl 9.—Apl 22 (1885).

Petition for tax sale. The State appeals. Affirmed.

Attorney General *Moses Taggart* for the State. The sufficiency of notice by publication before taking judgment for taxes is recognized in *New Orleans Drain Co.* 11 La. Ann. 338; *Fox v. Turtle* 55 Ill. 377; *New Orleans v. Cordiville* 10 La. Ann. 732; *Cadmus v. Jackson* 52 Penn. St. 295; *McClurg v. Ross* 5 Wheat. 116; *Frostman v. Ruggles* 58 Ill. 207; *Spellman v. Curtenius* 12 Ill. 411; *Thatcher v. Powell* 6 Wharton 119; as far as authority and precedent go, it seems to be left entirely with the legislatures in their discretion to say whether notice shall be actual or constructive: Desty on Taxation 721; *Dousman v. St. Paul* 23 Minn. 395; Cooley on Taxation 334; *State v. Guiterez* 15 La. Ann. 190; the proceeding is one in rem purely: *Schaeffer v. People* 60 Ill. 179; *Parks v. Miln* 48 Ill. 360; courts of chancery have been given authority to enforce tax liens in behalf of the State: *State v. Blake* 49 Texas 763; the Legislature is vested with absolute right of legislation unless restrained by the Constitution, and can determine how parties shall be brought into court: *State v. Guiterez* 15 La. Ann. 190; *New Orleans Drain Co.* 11 La. Ann. 338; state legislatures are no more restrained in their powers than the British Parliament; *People v. Morrel* 21 Wend. 563; *Butler v. Palmer* 1 Hill 324; *Bloodgood v. Mohawk & Hudson R. R.* 18 Wend. 9; *Legget v. Hunter* 19 N. Y. 445; a judgment by a divided court is held to have the same effect as any other judgment. *Lyon v. Ingham Circuit Judge* 37 Mich. 377.

John C. Donnelly and *Fred A. Baker* for Charles F. Campau, the owner of the land. Due process of law is intended to secure to the citizen the right to a trial according to the forms of law of the questions of his liability and responsibility, before his person or his property shall be condemned: *Parsons v. Russell* 11 Mich. 121. Except

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in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right that no person can legally be divested of his property without remuneration or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and facts: *Ames v. Port Huron &c. Co.* 11 Mich. 148. The words "due process of law" cannot mean less than a prosecution or suit, according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property: *Porter v. Taylor* 4 Hill 140. An order of sale not made upon any inquiry or determination by the court, but as a matter of course and because it is requested by an executive officer, is not a judicial order or decree in any proper sense; it has not the substance of a judicial proceeding, and constructive service, by publication, in ordinary civil or equitable proceedings, has never obtained except in cases where personal service was impracticable: *Mason v. Messenger* 17 Ia. 261; *In re Empire Bank* 18 N. Y. 199.

Charles A. Kent, a member of the Tax Commission, of counsel for the State. * * No act of the Legislature should ever be held void by an equally divided court. When such a case occurs all should unite in a judgment affirming its validity. The consequences of holding an act void, on which the people have acted for years, ought always to be borne in mind by judges. The judgment of the Court in such a case is a total destruction of all which has been built on the statute, and the Court is powerless to provide a substitute for the act destroyed. * * *

III. *Difficulties in the Collection of Taxes, and Attempts by the Legislature of Michigan to Avoid these Difficulties.* —It is plain that compulsion must be at the back of every attempt to collect taxes. Many men will not pay willingly debts freely contracted for their own benefit. Such persons are still less likely to pay taxes assessed, it may be, for objects with which they do not sympathize, and in which, at the most, their interest seems slight. And the persons in any community are probably few, who, on merely moral grounds, will contribute their share to the public burdens. Compulsion must therefore be the back-bone of every tax law, and the force used must be great enough to effect its object; and if harsh means are necessary, harsh means must be used. The State must have its revenues, or all government stops; and if loopholes are left in the law, so that a considerable

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portion of the property escapes, then those who do pay have to make up the deficiency, and there comes general dissatisfaction and an increasing number of attempts to escape the common burden. The necessary thing about a law for the collection of taxes is that its operation is successful, that all the property assessed bears its proper burdens.

How shall an unwilling tax-payer, or indeed any unwilling debtor be coerced? Imprisonment for debt is abolished. There remains but one other remedy. The delinquent's property must be seized and sold. And here the State is at disadvantage as compared with a private creditor. The latter can buy his debtor's property at such sale, and use it so as to get an income therefrom. The State cannot do this. If it buys, it can hope to realize only by some subsequent sale. Its taxes are secured only when a sale has been effected to some third party. It must sell, therefore, to such party. The State is interested in the good of all its tax-payers. It desires to do as little injury as possible, even to those who refuse to contribute their share to its support. What are the essentials of a sale which shall succeed in bringing the needed revenue, and yet shall be as just and as little burdensome to the delinquent tax-payer as possible?

They are these: 1. The tax assessed must be just, or at least levied according to law. 2. The purchaser must know exactly what he is buying. 3. The sale must be public and so as to secure as great competition as possible. 4. The persons interested in the property to be sold must, so far as practicable, have notice of the sale, so that they may protect their property. I will consider these essentials in their order.

1. The tax assessed must be just, or at least levied according to law. Here are two essential steps; the preparation of the lists of property on which the taxes are to be paid, and the determination of the amount of taxes to be raised, and its division among the persons and property listed. The method in which these steps shall be taken should be fixed by general laws. But the carrying out of the laws, and the amount of local taxes have to be left to each township or other municipality. The officers of each township are elected each year. No special knowledge is or can be required of them. To such inexperienced and ignorant officers is left the administration of complicated laws, and upon their compliance with the law has depended the validity of every tax. There have been varying decisions as to what requirements of the law are essential and what merely directory, but our courts have consistently held that a non-compliance with any

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essential provision of the law rendered a tax levied under it void. And sometimes, owing to a fact of which I shall speak hereafter, the courts have exercised an extraordinary acuteness in magnifying what seem non-essentials into fatal defects.

Usually defects of this kind do not affect the substantial justice of the tax, but in some townships, where there is a large amount of non-resident property, the local officers deliberately undertake to put upon it an undue proportion of the taxes, and if they succeed, the law is plainly violated and a gross wrong perpetrated. The only full remedy for such a state of things is the improvement of the local officers, the election of men who know the law, and have industry and independence enough to follow it. It is obvious that such a remedy cannot be obtained by any change in the law. It must come, if at all, through a general improvement of the electors in knowledge and integrity. A partial remedy has been sought by the Legislature (Laws of 1869, p. 377), in providing that no tax authorized shall be held invalid for any matter of form not prejudicing the rights of the party assessed: And this provision remained until 1882, but it does not seem to have accomplished much, since under it taxes are held invalid for want of a proper certificate by the supervisor *Dickison v. Reynolds* 48 Mich., 158; *Sinclair v. Learned* 51 Mich., 335.

If the State can collect its taxes only by showing that the local assessing and collecting officers have adhered to the law in all matters which have heretofore seemed to the courts essential, then I fear that all hope of such collection must be abandoned whenever a tax-payer will spend the time and money necessary to fight a tax to the utmost. But surely the taxes must be collected, and the law must somehow be made so that taxes essentially just may be collected, even against the most litigious tax-payer.

2. The purchaser must know exactly what he is buying. The importance of this requirement can hardly be overrated. If a private individual offers a store for sale, but gives no assurances that the purchaser will get a good title, of course he cannot sell, or can sell only for a trifle. And the State is no better than a private individual in this respect, and yet Michigan has been doing this very thing from its origin. It offers lands for sale, telling the purchaser that he must take the risk of the title, and telling him also, most of the time, that if the title fail, he will lose the purchase money. The natural result follows. At tax sales, purchasers are few.

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Those who bid do it in the spirit of gamblers. They know that they are taking large risks, that perhaps not one title in a hundred is good. Seldom does any one pay the taxes on a piece of land for less than the land. There is no real competition. Prudent, honorable men will not deal in tax titles. The business is left to a class careless of reputation, and unmerciful.

There are several difficulties in giving proper assurances to a purchaser:

(*a*) The chief of these is the fact that the right of the State to sell depends on the validity of the lien it is seeking to enforce, and this upon the proceedings of the local officers who have levied the tax. It is impossible that one who contemplates purchasing a tax title should look into these proceedings before a purchase. The task would be an arduous one. It would require the best legal talent. The decision of the best lawyer in favor of the validity of a tax would be very uncertain. If an examination were made, the purchaser might not get the land. The only practical way for one dealing in tax titles is to assume that they are likely to be invalid. He knows, however, that they are at least an apparent incumbrance, and that the owner of the land will ordinarily be likely at some time to pay some sum less than the cost of a litigation to get rid of the incumbrance. On this theory generally tax titles are bought, but very seldom is the tax paid for any part of the land offered less than the whole.

(*b*) Out of the fact last stated grows another serious difficulty in enforcing tax titles. The tax-title owner has paid a trifle for valuable property. He seeks to enforce his rights against an owner of the property who has paid full value, and who has been guilty of no fault but neglect. The owner of the tax title seems an extortioner, trying, it may be, to deprive a poor man of his homestead, his all. The sympathies of judge and jury are against him. The latter are sure to find every question of fact in favor of the original owner. And the judge is impelled, by a sense of justice, to find some legal defect in the tax title. "Where there is a will there is a way," and the result is a legal decision, which not only gratifies the court's sense of justice in that case, but affords another rule which tends to make all such titles worthless. This feeling in judge and jury, which makes it almost impossible for the owner of a tax title to a valuable piece of land, bought for a trifle, to succeed in a controversy with the original owner, is a very strong one. It must somehow be got rid of, or tax titles can

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never be a secure investment. The best way is the adoption of a system which, after giving the tax-payer the fullest chance to defeat unjust taxes, will give the purchaser such security as will generally prevent sales at much below the real value of the property. If hard cases under the best possible system will sometimes occur, the courts must be impressed with the fact that it is their duty to enforce general rules necessary to the public good, though individuals may suffer injustice.

(*c*) The tenderness of the Anglo-Saxon mind in depriving a man of his realty, has made a third difficulty for the purchaser of land at a tax sale to determine what he is getting. The collector of taxes, when necessary, may seize and sell on very short notice any personal property of a person to whom taxes are assessed, and from such sale there is no redemption. But where a tax can be collected only by a sale of the lands on which it is assessed, not only is the sale postponed for many months, but after a sale a tax-payer in this State, and generally in this country, has been given one or more years in which he may redeem. The effect of this is that the purchaser at a tax sale, even where the previous proceedings are all regular, has no certainty of anything, except that he has loaned his money for the period of redemption or less, at the option of the tax-payer. But men of means do not care to lend their money in driblets for an uncertain period at the ordinary rates of interest. The result is that the law must provide for redemption only on the payment of a great rate of interest. And this again increases the amount to be paid so considerably as to constitute a considerable reason why the owner of the property should contest the validity of the tax title.

Again, the fact that there is a redemption almost takes away the possibility that there should be any competition, unless from persons having a previous interest in the land, to get a tax title. There can be no great competition to loan money which may be paid the next day. The law, by reason of its tenderness for the tax-payer, gives him a period of redemption, and this makes it almost certain that if any piece of land is offered for taxes, the whole or none will be sold. The same folly is shown in the provisions of law for the sale of real estate on execution, or on the foreclosure at law of mortgages. In these cases, as well as in the sale of land for taxes, the law makes careful provisions to attract bidders by extensive advertisement, and then takes away almost all chance for competition by providing a period of redemption.

The Legislature of Michigan has made many attempts to

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improve the position of purchasers of tax titles. Its members have to some extent realized what would seem sufficiently obvious that the State, like a private person, cannot sell to advantage land when no assurance of title can be given to the purchaser. Though the statutes of 1827 and the revised laws of 1833 provided "that a tax deed should vest in the purchaser an absolute estate in fee simple, subject to all the claims the territory of Michigan should have thereon, and should be conclusive evidence that the sale was regular according to the provisions of the act," this Court held that the deed was conclusive only as to the regularity of the sale, and left the purchaser to prove that the previous proceedings were according to law: *Rowland v. Doty* Har. Ch. 3; *Scott v. Detroit Young Men's Society* 1 Doug. (Mich.) 121; *Latimer v. Lovett* 2 Doug. (Mich.) 204. These decisions made tax titles worthless.

In 1842 and 1843, the Legislature provided that tax deeds should be "prima facie evidence of the regularity of all the proceedings to the date of the deed." This statute was sustained by the courts, has ever since been the law, and is the source of whatever value tax titles had prior to 1882. *Sibley v. Smith* 2 Mich. 493; *Lacey v. Davis* 4 Mich. 140.

The burden is now thrown upon a person who would resist a tax title, to point out its defects, and it is usually cheaper to buy the title than to employ a competent person to ascertain the defects.

In 1858 the Legislature provided that, after tax deeds have been recorded a certain period, they shall be conclusive evidence of title: Laws of 1858, p. 176, et seq. But this statute was held invalid. *Waldby v. Callendar* 8 Mich. 430; *Quinlon v. Rogers* 12 Mich. 168. A like provision as to lands bid off by the State and held for five years, met with a like fate: *Groesbeck v. Seeley* 13 Mich. 342.

An attempt of the Legislature to make it certain that the grantee of a tax deed shall at least get his money back, has not been very successful: Laws of 1865, p. 575; How. Stat. § 1167; *Hart v. Henderson* 17 Mich. 220; *Robbins v. Barron* 32 Mich. 36: 33 Mich. 124; *Weimer v. Sorter* 42 Mich. 569; *Ellsworth v. Freeman* 43 Mich. 488; and a statute providing that a tax deed shall be good if any portion of the tax is valid, is held so far void. *Silsbee v. Stockle* 44 Mich. 561.

I have cited these statutes and decisions, not to find fault with the latter, but to show the constant struggle which has been going on between the Legislature and this Court. The

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Legislature has been impressed with the fact that if the State revenues are to be collected, some way must be found by which the land of delinquents can be sold and a good title given. The judiciary has consistently held that this can be done only when the requirements of the law as to the assessment and collection of taxes have been substantially followed, and that a tax sale is void if any illegal tax is included in the amount for which the sale was made. The result has been a growing belief in the invalidity of all tax titles, and as a consequence the inability of the State to sell delinquent lands for the amount of taxes due. The law has been that the State bid in all lands offered at tax sales, where bidders were not found to pay the amount of the lien. The lands thus bought, the State held for private as well as public sale for the amount of its lien. Great accumulations of lands in the hands of the State followed as a matter of course. Lands held by the State for five years were not thereafter subject to assessment until the State title had been sold. Afterwards provision was made that all State tax lands which had been held by the State five years, should be sold to the highest bidder without reference to their cost to the State: Laws of 1869, p. 367, sec. 124. The effect of this was that parties who had not paid their taxes for years, were enabled to buy in their lands at such sales for a trifle, and thus clear them from all tax liens. In consequence, in 1875, the provision authorizing such sales was repealed, and thereafter the accumulation of delinquent lands in the hands of the State went on increasing. The original owners of these lands were, as I am informed by Mr. Pratt, long the Deputy Auditor General, almost wholly non-residents. The statutes allowing the summary sale of the personal property of tax-payers, for taxes, were effective in compelling the general payment of taxes by residents. But as against non-residents, no remedy could exist except the sale of their lands. Non-resident owners have large bodies of land, especially in the northern parts of the State. Many of them soon learned the worthlessness of tax titles, when thoroughly contested. They had abundant means to make such contests. They deliberately determined not to pay these taxes and to take the chance of defeating all tax titles. Bidders at tax sales would not venture into a contest with such men, and left their lands to be bid in by the State. The owners permitted such sales, relying on their being able to clear the lands from all tax incumbrances when finally the State should be obliged to sell its tax lands to the highest bidder, irrespective of costs.

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The conduct of non-resident owners of lands in Michigan has been the natural result of the tax laws of Michigan. Men of another state are not likely to pay taxes on property here unless compelled. They mean no public odium by refusal; their refusal has been often excused by the attempts of many townships to saddle on them more than their share of the public burdens. The result of the laws has been to make favorites of those whom nobody in the State wishes to favor. The State of Michigan has lost millions of dollars of taxes justly due from non-residents. The deficit thus resulting, has, of course, been made up by residents. Another result has been the direct favoring of the rich over the poor. A resident who lets his land be sold for taxes is usually a poor man; if not, the collector will make the taxes out of his personal property. Generally residents who do not pay their taxes are not only poor, but ignorant; they are the natural prey of tax-title speculators. When an ignorant and poor man learns that his homestead is claimed by a tax-title purchaser, under a title prima facie good, naturally his alarm is such that he is ready for almost any compromise, and if he goes to a competent lawyer, he is told that it is better to pay the speculator an enormous profit, rather than to stand a suit.

The evils which the State of Michigan has suffered from its tax system for many years are certainly worthy of the most serious consideration. It has lost millions of money justly due from wealthy non-residents. When, through the carelessness of its poor residents, these lands have been sold for taxes, it has taken the whole land to bring the taxes, and the owner, to redeem his land, has been obliged to pay an enormous profit to the speculator. Worst of all, perhaps, it has made a class of men absolutely essential to the collection of its revenue, purchasers of tax titles, ignominious, until the name of being engaged in buying tax titles is a disgrace. It has therefore driven from such purchases almost all men who are not naturally gamblers, and inclined to a business which involves great risks and chances.

The State of Michigan has been issuing innumerable deeds, which its officers know are in all probability worthless. It has been building up a class of speculators worse than those who gamble in stocks or in grain. All this it has done because it has given no assurances to purchasers at tax sales as to what they would get, and so made it a business which honorable men cannot pursue in an honorable way.

3. The third essential to a tax sale is, that a sale must be

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public, and so as to secure as great competition as possible. In Michigan this sale has always been to the highest bidder, and notice of the sale has been given by the law which fixes the date on which each sale shall begin, and also by notice published in some paper of the county. The state of the law on this point seems adequate, though as I have heretofore pointed out, the expected competition has been defeated by the provisions for redemption.

4. The fourth essential is: The persons interested in the property to be sold must, so far as practicable, have notice of the sale so that they may protect their property.

No one would doubt the desirability of making such notice personal. Persons aware that their property is about to be sold for a small lien would be likely either to discharge the lien and so prevent a sale, or to make sure that there was such competition that only a small portion was sold. If they did not do this, they would not receive much sympathy on account of their loss of the property sold. But personal service of notice on non-residents would be impracticable. And personal notice to residents would be difficult and expensive. All the persons interested in a piece of land could be ascertained only from the records of the register's office of the county where the land lay. This would render necessary the getting of an abstract of title for every piece of land delinquent. This abstract would have to be perfected to the date of the sale. And such abstract would be imperfect evidence of the state of the title. It might show title in a person who was then dead. The expense of such an abstract would be in many cases several times the amount of the tax. It would, of course, have to be added to the tax, and so greatly increase the burden on the least unworthy class of delinquents, those who do not pay because of poverty. The expense of serving the notices would also be considerable, and it too would have to be added to the tax. And if the validity of the sale depended upon the fact that personal notice was given to all interested, this would add a new and great element of uncertainty in the purchase.

And these notices, in the great majority of cases, would be unnecessary. Men who have an interest in real property must be assumed to know that it is subject to taxation, and the time when the tax is payable. They are also, if residents, personally solicited by the collector to pay each tax assessed to them. They may also be assumed to know the day in the year on which lands are sold for taxes. They are very likely to see the notice of the sale, published in a paper of the county where the land lies.

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For these reasons, notice of tax sales by publication in some paper has been deemed sufficient and universally practiced.

The difficulties connected with the sale of lands for delinquent taxes became so pressing that in January, 1881, both the incoming and retiring Governors referred to it in their messages. It was then ascertained that there was more than three millions of dollars due the State on the lands it had been compelled to take, for the want of other bidders. Governor Jerome recommended that a Tax Commission be appointed to revise all the tax laws. The Legislature adopted this recommendation and passed the act under which the Commission afterwards acted. (Laws of 1881, p. 146.) I am credibly informed that this step was taken with the approval of some of those then members of this Court, and that the act was drawn by one of them. I do not think that any suggestion of its unconstitutionality was made until the argument of the *Iron Cliffs* case. The members of the Commission were promptly appointed, and soon after began their work.

IV. *The Work of the Tax Commission.*—I was a member of that Commission, and deem it but justice to them and the Legislature who adopted their recommendations, to state the motives which led to the framing and adoption of those parts of the statute whose validity is now assailed. Much time was spent by the Commission, and many questions carefully considered, not involved in this suit, but we all felt that our most important work was to find some way in which owners of real estate, and especially non-resident owners, could be compelled to pay their share of the public burdens. We were told that many non-resident owners of large bodies of lands in the northern parts of the State, were systematically refusing to pay their taxes, and practically defying the State to collect them. We were familiar also with the attempts of previous Legislatures to remedy the difficulty, and their failures. The great question was to devise a statute, free from constitutional objections, which, without injustice or unnecessary hardship upon poor, or merely careless taxpayers, should compel the payment of all lawful taxes. I wish the members of this Court could stand in the exact position where the members of the Commission stood, and feel the motives which operated on them. Surely the evils under which the State had long suffered, demanded a remedy; did they not? It was not right that so large and increasing a proportion of the taxes should go uncollected. Something must be done. But what? We early came to the conclusion

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that previous Legislatures were right in feeling that somehow tax titles must be made good, or tax sales would not bring the needed revenue. As the ground on which tax titles have been held invalid is the non-compliance with the law by the assessing and collecting officers, the most obvious remedy would be to secure the due observance of the law in essentials, and make non-essentials immaterial. This last we sought to do in sections 84 and 85 of the Act as passed. But the former, the due observance even of essentials, by officers chosen as in Michigan, seemed to us beyond the power of any statute to secure. Some error sufficient to make a tax title invalid, we felt sure would creep into the great majority of taxes in spite of any care a law could secure. And any remedy which could come from increased care in the taxing officers, must be very gradual, and could be secured only by decisions of this Court holding tax titles valid in individual cases, and so removing the present general opinion of that invalidity. Such decisions in cases between a poor man and the speculator who had bought his homestead for a trifle, past experience made it impossible to expect. The judicial mind inspired by a desire to prevent what seems a great injustice, is microscopic in its power to see defects, and no attainable care in taxing officers can prevent the finding of defects sought under such circumstances. And such decisions, if given, would operate with great hardship upon many tax-payers, who, trusting to the general opinion of the value of tax titles, allowed their lands to be sold, and suddenly woke up to the fact that they were gone forever.

We abandoned, therefore, the hope of perfecting tax titles through a perfection of the preliminary proceedings. But one other course was left. The validity of the previous proceedings must be conclusively determined before the sale. How could the validity of such tax proceedings be so determined? There is but one way. There must be a suit brought by the State claiming a lien for the taxes assessed, and asking for an order of sale for such taxes as are held valid. To this suit all the persons interested in the land to be sold must be parties.

That the State has a lien on a piece of land for all unpaid taxes properly assessed will not be disputed. Nor did it occur to any member of the Tax Commission that there was doubt of the power of the Legislature to authorize the State to enforce its lien for taxes like that of a mechanic. Nor am I now able to see the least rational basis for such a doubt. It is certainly as important that a State should collect its revenues

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as that a private person should collect his debts, and it ought to have at least equal powers for this purpose. But in the devising of a practical scheme by which the State could bring a suit for the enforcement of its liens against delinquent lands, many difficulties arose. It were easy to have avoided all the legal difficulties we then saw, by treating the tax lien like a mortgage, and authorizing the Auditor General to enforce it by a bill in chancery against each piece of delinquent land and all persons interested therein. And this seems to be the law in Missouri: Laws of Missouri, 1879, p. 1343, § 6839.

But the enormous expense of such a proceeding deterred us. The State would do better to give up the most of its tax claims than to incur such expense; and if the whole amount was put, as in justice it should be, upon the delinquent, his burden might be aggravated twenty-fold. But if there is no other legal way in which the validity of a tax lien can be determined before sale, then I should advise the Legislature to provide for a bill in chancery to enforce each tax lien. Anything is better than for the State to continue its past course of encouraging one of the worst forms of gambling.

It seemed to us, however, useless to file separate bills all in substance the same, against each piece of delinquent land. The substance of each bill could be nothing else than a statement that the State claimed that such an amount of taxes had been lawfully assessed against the land named. Nor did it occur to us that any judge could think it necessary to go back to the old doctrine that in seeking to establish a claim for taxes, it is necessary to prove the validity of each step taken in the previous tax proceedings. And if no such proof is to be required, surely no setting out of such steps is requisite. Nothing need be averred in any pleading which is not required to be proven. If it be in the power of the Legislature to provide that a tax deed is prima facie evidence of the validity of all proceedings, it must be in the same power to give a like effect to the return of taxes to the Auditor General. The expense of looking up each proceeding in every township and school district, involving the validity of some portion of a tax would be enormous, and must properly be charged upon the delinquent tax-payer. We adopted the plan of a joint petition against all delinquent lands, with simple general averments, because of its comparative inexpensiveness, and because we could not see that the rights of any tax-payer would suffer in consequence. As soon as a

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tax-payer appeared and filed objections, the suit as to him would become general.

Every detail of the plan adopted was made after careful consideration of its practical working. The aim was to give the tax-payer complaining a cheap method of getting a tax illegal set aside, in whole or in part, as might be just, while the proceedings were made sufficiently summary to make sure that the business would be all finished before the day of sale.

The great difficulty which we saw was in bringing the parties interested into court, so as to make its decision final. We had no doubt that personal service was desirable. But we saw at once that it involved all the difficulties and all the expense which I have pointed out in considering the proper notice of a sale. Reluctantly, therefore, we gave it up. The only substitute was notice by publication. And here we had to consider its justice, and then the power of the Legislature to authorize a conclusive judgment on such notice. The question of justice concerns two classes, the first and most important, non-residents; the second, residents. It may be assumed that judicial proceedings to enforce liens against the land of non-residents, where notice is given only by publication, are both just and legal, since such proceedings have long been in force without objection in this and probably all other states in the Union, if not in every civilized country. Indeed, this is the only notice which is legal, since the courts of one state have no power to serve its process outside of the state. The question concerns then only residents, and of these only such as are able to escape the payment of their taxes because they have not personal property on which the collector can levy. And here I will compare the provisions of the new and the old law. What new hardship does our law impose upon such resident tax-payers? Here a distinction should be made between illegal and legal taxes. Our law gives to a tax-payer three different and inexpensive remedies against illegal taxes, which he did not have before. He may appeal from the judgment of the supervisor to that of the board of review upon the question of the amount for which he shall be assessed: Secs. 18 and 19. He may appeal to the board of supervisors against the validity of any tax proposed to be raised: Sec. 24. And lastly, he may file objections to the validity of any tax in court, and get a judicial decision thereon, and may, if he is beaten, take the case to the Supreme Court: Secs. 57 and 61.

The remedy to set aside illegal taxes not rejected by the

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Auditor General, under the old law, was the expensive one of a bill in chancery to enjoin a threatened sale. The only other remedy was to let the land be sold and fight the tax title. This also was expensive, and spite of the usual worthlessness of tax titles, more risky than a prudent man would like to take.

It seems entirely plain that the law of 1882 is much better adapted than that which preceded it to do justice to a careful tax-payer, who wishes to pay all legal taxes and have all that are illegal set aside. As against legal taxes neither law gives any remedy, and under either the careless tax-payer will find his land sold. But under the law of 1882, the sale will be on such terms as to produce real competition, so that the tax-payer will be likely to lose but a small portion of his land, while under the previous law the whole was sure to go for the amount of the tax, however insignificant.

The considerations of objections to taxes will be likely to be much fairer under the law of 1882 than before. The stake will be only the amount of the tax, and not the whole of a valuable lot or farm. Justice will be administered, according to more fixed and practicable rules, when the only question is whether the State shall get a trifling tax or the tax-payer be relieved from its payment. And tax-payers will not, under the new law, seek to show trifling defects in the proceedings, which affect the amount of their taxes inconsiderably.

The only thing which the new law takes away from the careless tax-payer is the right, after two years or more of silence, to find defects in the taxes. The commissioners carefully considered the question whether this time might not safely be extended. There seemed no special justice in requiring a resident to pay his taxes at once under penalty of a sale of his personal property, and in giving a non-resident such a long time. But another consideration seemed more decisive. The value of many lands consists in a large part in their timber. If four or five years are given before sale, many tax-payers might cut off their timber and let their land be forfeited. Sometimes the right to object to illegality in tax proceedings must be cut off, or there can be no security in tax titles, and hence no competition at tax sales. It may be said that it is unjust that this should be done without personal notice to the tax-payer. The only object of personal notice is to let the tax-payer know that his lands will be sold if he does not pay the tax. And this is fairly done under the law of 1882. The collector is bound to demand the tax before he returns the land.

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The board of supervisors may authorize further notice to be given (sec. 50), and this they will be likely to do if any injustice is found to come from their not doing it. The taxpayer himself must be supposed to know the taxes on any piece of land must be paid; he can, by a little inquiry, learn the day for the court proceedings and for the sale, if he does not see the published notice. There is scarce any danger that a moderately careful man will find his land sold, without the grossest carelessness; and no personal notice will correct the carelessness of the grossly careless. The law of 1882 may, if rigidly enforced, occasionally cause loss to some members of this class, but it is a loss not likely to be considerable, since competition will then prevent too great profit to the tax purchaser. But if such loss is necessary, it is demanded by the strongest necessities of public policy and must be borne.

The Commission gave a great deal of thought to the question, whether it is in the power of the Legislature to make a judgment against a piece of land conclusive evidence of the validity of the taxes against resident owners who have had no personal notice of the proceedings. If we had trusted to the personal views of the lawyers of the Commission, we should have looked into our Constitution, and finding there no prohibition, should have said unhesitatingly, there is no doubt of the power. But not feeling certain that this Court would look at the matter in the same light, we looked into the statutes of other states. We found that in Illinois a system of getting judgments against lands for taxes prior to sale has long existed, that service in such cases is by publication only, and that such judgments are conclusive as to all matters prior to judgment. Statutes of Illinois, 1880, pp. 899 and 907.

We found also a similar statute in Minnesota, with provisions making sales under the tax judgment conclusive evidence of title, with certain exceptions, not perhaps broader than are implied or expressed in the Tax Law of 1882: Statutes of Minnesota, 1878, pp. 230, 236. We found statutes somewhat similar in other states: Statutes of Nebraska, 1873, p. 940 et seq; Statutes of Nevada, vol. 2, p. 191 et seq; Statutes of Tennessee, 1871, vol. 1, § 612 et seq. We looked into Judge Cooley's work on Taxation, p. 357, where he discusses judicial sales for taxes, and into the decisions, and found no hint that any constitutional objection had been made to such judgments and sales. We tried to reason on the subject from first principles. We could not see why, if a court of admiralty, from custom and necessity could condemn a ship and sell it, so as to convey a perfect title, without personal ser-

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vice on any owner, a sovereign state, untrammeled by constitutional prohibitions, might not authorize its courts to exercise like power. We thought, too, that if the law could authorize a sale of the lands of non-residents, without personal notice, because of the impracticability of such notice, a like impracticability, of which the Legislature would be the sole judges would justify such sales in the case of residents.

But, conscious of the uncertainty of our opinions upon questions of constitutional law, and feeling deeply the importance of the matter to the State, we thought it right to ask the opinions of the judges then members of this Court. A draft of a bill was prepared and printed, containing provisions for decree and sale, substantially, though not in detail, like those finally adopted. A copy was given to each judge with the request that he would examine it, and especially the judicial proceedings, and tell us whether in his judgment the bill was free from constitutional objection. No hesitation was expressed in answering these inquiries; each judge expressed his views freely. The opinions of three upheld the validity of the method of sale proposed; the fourth said he thought the proceeding would be more administrative than judicial; doubted the conclusiveness of the sale, but said he thought the decree could do no harm. Afterwards, when the bill came before the Legislature, these opinions of the judges were freely repeated to its members and their action was doubtless based in part thereon. I mention the matter here, not because such opinions are binding on any one, but to show the care which was taken by the Commission and the Legislature.

We called the court having charge of the judicial proceedings in the law of 1882, a court of chancery, and in this respect we did not follow the statutes of Illinois and Minnesota. We made this change because a court of chancery is here the common tribunal for the enforcement of liens by judicial sales, and because there is a great amount of law with reference to the course of proceedings, and especially the confirmation and setting aside of sales in foreclosure cases, which we wished to guide the court, without special enactment. None of us, however, thought that proceedings in a court of chancery were any less or more within the control of the Legislature than those of courts of law, nor that the validity of the judicial proceedings could in the least depend upon the name we gave the court in which they were to be enforced.

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V. *Constitutional Objections to the Tax Law of 1882.*—It is very difficult to classify the objections made in Judge Campbell's opinion, but substantially I think they are included under the following heads. The language used is my own:

1. That the whole law is void, because the Tax Commissioners discussed the merits of the bill on the floor of the legislative chambers, and all amendments offered were referred to them.

2. That the Legislature has no power to authorize a court of equity to entertain suits to enforce tax liens.

3. That the law does not provide for personal service on parties interested in the land to be sold.

4. That it does not give defendants a right to a trial by jury.

5. That there is no appeal from the decision of the circuit court on the admissibility of evidence.

6. That the petition of the Auditor General does not set forth the grounds on which the alleged tax is valid.

7. That hundreds of defendants owning distinct pieces of land are united in one suit.

8. That in case of non-appearance a decree is rendered for the tax without proof, and the sales are confirmed in the same way.

9. That the record of the proceedings is not kept in the court of chancery.

10. That the law does not give the court any power of preventing parties from being deprived of rights by accident, ignorance or the misconduct of others.

11. That no provision is made for protecting the rights of infants or insane persons.

1. The first objection is the only one which goes to the whole law. If sustained, the statute and all proceedings under it for the last three years are void, and the State has no tax law, and no one is under legal obligation to contribute to the support of its public institutions. If this objection is untenable, the other objections refer wholly to the collection of taxes by the sale of delinquent lands, and these may be held invalid without such fatal consequences as must follow if the whole law is held void.

It is therefore necessary to examine carefully the grounds of this objection. It seems plain that it cannot rest on the law permitting the commissioners to speak on the floor of either house. If such law was unconstitutional, it was void and bound no one. At the most it was a rule of procedure

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which the Legislature could have changed at any time. If the tax law represented the will of the Legislature, expressed in constitutional form, its source can be of no consequence. It will not surely be claimed that if the law granting the commissioners the right to participate in the legislative discussions had never been acted upon, the tax law would have been invalid on this account. The objection must then be, to what was actually done,—to the fact that the commissioners did on the floor of each house debate the tax law, and that amendments were referred to them.

And the objection must be, not to the fact that the action of the Legislature as to the whole or any portion of the law was influenced by the views presented in debate or reports by the Tax Commissioners. It is impossible that this Court should know what in fact influenced the members of the Legislature. Judge Campbell finds that so much of the statute "as brings in substantial innovations upon the old system," is to be traced to the influence of the Tax Commissioners in debate or in their action upon the amendments proposed. But the journals afford no evidence of such a fact. No amendment in either house was ever offered, which affected in any important particular the law as prepared by the Commission. No attempt was made to change the scheme for a judicial sale of delinquent lands, save in slight and immaterial points. The tax law was passed by very large majorities in each house. Surely this Court cannot assume that it would not have been passed, if the Commission had never been present at any of its sessions.

And if this Court could ascertain that some parts of the law would not have been enacted, except for the supposed improper work of the commissioners, this would be no ground for holding invalid the other parts of the law. The whole law should not be set aside for an evil influence found to affect only a part.

So far then, as the point under consideration bears against the whole law, it must be based on the fact that the commissioners debated the law in each house, and gave their views on amendments submitted. It must be claimed that an unlawful influence was brought to bear on the Legislature, which rendered their action void. The general doctrine that the courts cannot inquire into the motives of legislators or the sources of their opinions is well settled: Cooley's Const. Limitations, 226 and note; *Lynn v. Polk* 8 Lea 121.

The proof that a bill was passed by bribery of a majority of both houses, does not render it void. It is not claimed

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that the act is void, because passed through the influence of the Commission. The illegal thing is, that this influence was exerted in a particular way. It is not unlawful that a subject is referred to a commission, and they prepare a bill and strongly recommend its passage. It is not illegal that commissioners, or anybody else, lobby with each member, or go before committees to advocate the passage of a law.

It would seem that if a whole subject could be referred to a commission and they allowed to report a bill, and recommend its passage, the reference of amendments to such bill to the same commission cannot be unlawful. And if any one may lawfully advocate any pending measure before committees of either house, it is difficult to see why the same thing may not be done before a committee of the whole house. If not, at what point in the increase of the numbers of a committee does that which was legal become illegal?

If the subject is to be looked at from the stand-point of the result to be accomplished, the plan adopted in the act providing for the Tax Commission seems the best possible.

The Commission was appointed because it was thought that by giving more time to the subject they could prepare a draft of a better law than would be made by a committee of the Legislature. It was most important, that when such draft was submitted to the Legislature, the reasons which led to every clause should also appear, and that the Commissioners should be able to give their answer to every objection which might be suggested. The plan adopted accomplished the purpose. It is true that it gave the commissioners great influence, but it was a just influence; it was the influence which men who have devoted a long time to the examination of a subject, ought to have over fair-minded men, who are conscious that they have not an equal knowledge. It is said that the legislation in question was actually influenced by the intervention of the Commission. Very likely it was; it was for this end that the Commission was appointed; for this end that the Governor was requested to select "proper and discreet persons." The Commission was useless except to have an influence on the Legislature. The principle involved is one of very great public importance. As the State grows the complications of legislative questions will become greater and greater. The plan of referring difficult laws to a commission of experts for the fullest examination and report, is more and more desirable.

The usefulness of such commission cannot be fully secured except by bringing its members into direct contact with the

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Legislature, and securing thereby the freest possible exchange of views. Allowing them to participate in legislative discussions is the best and perhaps the only way in which such exchange of views can be secured. No doubt the influence of such a commission is likely to be very great. But it is in its nature the best influence which can be brought to bear upon legislatures. It is the influence which ability and knowledge always give in every full and fair debate. As well might complaints be made of the influence of lawyers in arguing a case in this Court. It is the influence which courts and legislatures alike need as to every matter of importance before them.

When now a judge says that this influence, in its nature so desirable, is so contrary to constitutional law as to destroy any statute to which it may have contributed, we do well to earnestly inquire where he got this rule of the Constitution? And when no clause of the written constitution is referred to, and no decision of any court, we may well conclude that the judge is mistaken, and that unconsciously he has elevated one of his opinions into the dignity of a constitutional restriction.

2. The second objection is: The Legislature has no power to authorize a court of equity to entertain suits to enforce tax liens. This objection seems to me a fair inference from the language of Judge Campbell's opinion, though it is nowhere distinctly stated. It would seem that a court of law must be equally powerless. That seems to follow, from the claim that the collection of taxes must be administrative, and not judicial. The result is that the State must continue the practice of the past, sell lands to which it conveys no title, foster a race of gamblers more odious than gamblers in stocks or in wheat. It must continue a system, which experience shows to result in allowing wealthy non-residents to escape their taxes, while poor and careless residents have their homesteads sold for a trifle, because there is no competition at tax sales, and are able to redeem them only by paying the tax title speculator an enormous profit.

If there is a principle of constitutional law, which leads to these results, where is it to be found? Certainly not in any provisions of our written Constitution. Certainly not in the decisions of this or any other court.

3. The third objection is: The want of personal service. The desirability of such service, and the difficulties which make it almost impracticable, I have previously pointed out. But the mystery is to explain how it becomes a constitutional

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question. There are a great many cases in England where courts of equity proceed without personal service on defendants: 1 Dan. Ch. Pr. 498–517.

And it is perfectly settled, not only in this State, but elsewhere, that service by publication is good in suits for the foreclosure of mortgages against non-residents, and against residents who are absent or concealed: 2 How. Stat. p. 1724. And there are other judicial proceedings which are binding on residents, though the only notice is by publication, as of the probate of a will: How. Stat. § 5801. The same is true of notice for the appointment of an administrator: How. Stat. § 5866. And persons who have claims against the estate of a person deceased, must prove them within the time fixed, though they have no personal notice: How. Stat. § 5889.

Nor is there any less hardship in losing rights in administrative proceedings, without personal notice, than in judicial, and in very many cases the statutes make such loss possible. It is unfortunate that any one should lose his rights to anything without personal notice. But the giving of such notice is, in many cases, so difficult and expensive, that a rule of law which dispenses with it is on the whole for the public good. The difficulty of giving personal notice in a given case, and the evils which will follow from the want of such notice, are questions of degree and of experience, peculiarly therefore for the Legislature to decide. And in the absence of a special constitutional restriction, it seems impossible to find any basis which can justify a court in interfering with the matter.

4. This fourth objection is: That the law of 1882 does not provide for a trial by jury. This claim is based on a provision of our written Constitution. Sec. 27 of art. vi, says: "The right of trial by jury shall remain." The utmost that can be claimed with any reason here, is that the right of trial by jury shall remain in those cases where it existed at the time the Constitution was adopted. But such right never existed in chancery cases: *Bellows v. Bellows* 58 N. H. 60; *Copp v. Henniker* 55 N. H. 210; *Middletown Savings Bank v. Bacharach* 46 Conn. 513; Sedgwick Const. & Stat. Law (2d ed.), 488, note. If, therefore, the Legislature may authorize the enforcement of a tax lien in chancery, they do not take away any right of jury trial which ever existed, and where, in the enforcement of a mechanic's lien in chancery, the Legislature authorized a jury trial, this Court held that a verdict was merely advisory and not binding: *Willard*

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v. Magoon 30 Mich. 273; *Dunn v. Dunn* 11 Mich. 284. A jury whose verdicts are merely advisory, is not the jury which the Constitution intended to preserve. It is very strange if the Legislature may authorize the enforcement of mechanics' liens without the intervention of a common-law jury, and cannot do the same thing in behalf of the State for the enforcement of tax liens. The case in *Tabor v. Cook* 15 Mich. 322, has no bearing, since their attempt was to enforce a legal title by a bill in chancery, whereas the attempt here is simply to collect a lien by the sale of so much of the land as may be liable. And this case is an authority in point to the effect that if the proceeding authorized by a statute is a proceeding in chancery, there is no necessity of a jury trial.

5. The fifth objection is: That there is no appeal from the decision of the circuit court on the admissibility of evidence.

In sustaining this objection, it is said that by our Constitution "the Supreme Court is given supervisory power over all other courts."

If the deduction intended to be drawn from this provision is, that every question of law must be in some form reviewable in the Supreme Court, the principle is one of far reaching importance, and should be announced in unmistakable language. If sound, it must prevent all attempts to limit the pressure of business upon this Court by limiting the right of appeal to cases of a certain amount. That such a rule is contrary to many and harmonious decisions of this Court is pointed out by Judge Cooley in his opinion in the *Iron Cliffs* case. In addition to the decisions cited by him, I cite *Maxfield v. Freeman* 39 Mich. 64; *Clark v. Raymond* 26 Mich. 415.

6. It is further objected by Judge Campbell, that the petition of the Auditor General does not set forth the grounds on which the alleged tax is valid. This is a question of pleading. It is not claimed that it does not inform the taxpayer substantially what is claimed and what decree is sought. The most elaborate statement which could be devised would do no more than the simple petition provided by the statute does. The petition, therefore, satisfies every requirement of natural justice.

7. Another objection is: That hundreds of defendants owning distinct pieces of land are united in one suit. This objection is one of multifariousness. The doctrine of multifariousness in chancery is based on the difficulties which would arise if entirely different issues, having no relation to each other, were sought to be settled in one suit. It is a

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doctrine of convenience, and one where it is almost impossible to lay down general principles. But every difficulty as to multifariousness, according to the strictest chancery principles, in the carrying out of the law of 1882, vanishes the moment it is considered that with the appearance of each defendant, the suit becomes several as to him, and is henceforth conducted as distinctly as though from the first the proceedings were against him alone.

8. The eighth objection is: That in case of default, a decree is rendered without proof, and that sales are confirmed in the same way. The provision as to the decree is based on the presumption that no lands will be returned to the Auditor General as delinquent, unless they are so, and that the Auditor General will not advertise lands not returned as delinquent. Judge Cooley points out very clearly that this presumption is of the same kind which has existed and been approved by the courts of this State for forty years; and if it is now to be overthrown, and it is to be held that there is some unwritten constitutional provision which prevents the courts from enforcing any presumption authorized by the Legislature in favor of the validity of tax proceedings, all attempts to collect taxes may as well be given up.

It is important to notice that, under the law, the presumptions made against one who does not appear, are not conclusive. If a man has paid his taxes, or if his property is exempt, he may move to have the sale of his property set aside within one year after having personal notice of such sale: Sec. 64.

The same argument applies to the objection as to the confirmation of sales. It is presumed that the officer selling has done his duty, and when he returns the fact of the sale it is presumed that the sale has been according to law. Nor do I think that the report of a circuit court commissioner of a chancery sale affords any more security that the sale has been according to law, than the briefer report of the officer selling lands for taxes under the law of 1882. In either case, unless objections are made, the sale is confirmed, as a matter of course.

9. The ninth objection is: That the record of the proceedings is not kept in the court of chancery. Judge Campbell says, "The whole court action appears in the book entries and nowhere else." This statement is hardly accurate. The general decree against all lands, where no objection is sustained, is entered in the usual chancery records, though the description of the lands and amount of the tax

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appear only by reference to the record book: Sec. 58. Special decrees are entered in full in the usual place for chancery decrees: Sec. 60. If experience should develop any difficulty in this method provided of keeping the records, it could easily be corrected.

It is impossible for me to understand how any constitutional question is involved, how especially there can be any unwritten provisions of constitutional law which require the records of a court of chancery to be kept in one place rather than another.

10. The tenth objection is: That the law does not give the court any power of relieving parties from the consequences of accident, ignorance or the misconduct of others. Section 62 provides: "The proceedings, where the validity of any tax is in dispute shall, where no other provision is made herein, follow the ordinary chancery practice, and the court may allow amendments as in ordinary cases." In section 64 is this provision: "The practice with reference to setting aside such sale shall be the same, so far as applicable, as in a sale in equity on the foreclosure of mortgages: Provided no sale shall be set aside for inadequacy of price, except upon payment of amount bid upon such sale with interest and costs." It seems to me that these provisions give a court power to relieve against accidents, etc. Indeed there seems very little limitation in the law upon the ordinary powers of a court of chancery; and when the tax has been paid or the property is exempt the sale may be set aside years after its confirmation: Sec. 64.

11. The last objection is: That no provision is made for protecting the rights of infants or insane persons.

It would be desirable if guardians could be appointed for infants and insane persons in the proceedings for judicial sale under the law of 1882. But if this were done, it would not only be necessary to ascertain the owner of every piece of land, but also their ages and mental condition at the time when the proceedings were begun. To do this, if practicable, would entail a great expense upon every description advertised. The appointment of guardians, when necessary, would make an additional expense; and such guardians, when appointed, could in the great mass of cases do nothing for their wards. In ninety-nine cases out of one hundred, it would cost far more to ascertain any defects in the tax proceedings than the deduction which would be made in consequence.

Then generally where persons not able to attend to their

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own business have property, they have guardians whose duty it is to pay the taxes, and who are liable if they do not pay them. The hardship of selling the property of persons under age, or non compos, for taxes without the appointment of guardians, is much more theoretical than real; it has always existed under the tax laws of this State, and yet no complaint has been made. I find no decisions which make the appointment of such guardians in judicial proceedings a constitutional question. It seems like the question as to service of persons of full age by publication, one of conflicting evils and entirely within the discretion of the Legislature.

For a fuller and abler discussion of some of the constitutional questions involved, I refer to Judge Cooley's opinion in the *Iron Cliffs* case.

VI. *The Effect of the Iron Cliffs Case.*—In that case the decision of the court below in favor of the constitutionality of the law of 1882 was affirmed by an equal division of this Court. So far as the parties to that case are concerned, the judgment was conclusive: *Lyon v. Ingham Circuit Judge*, 37 Mich. 377, and authorities there cited. The question is as to the effect of that case upon the decisions of all inferior tribunals. This question is one of propriety and public policy rather than strict law.

It may be said that an unconstitutional law is no law, and that therefore anybody may treat it as void, running the risk of the consequences if his view is not sustained by the courts. Even if this is true, considerations of modesty ought to affect the decisions of all inferior tribunals. In *Ortman v. Greenman* 4 Mich. 294, this Court comments with severity upon the action of a justice of the peace, in presuming to hold void an act of the Legislature. And the general doctrine has been, so far as a doctrine can be shown by practice, that a circuit judge should not presume to sit on the validity of an act of the Legislature, but should leave such questions to be settled by the Supreme Court. There is of course a presumption in favor of the validity of every statute. One co-ordinate branch of the government has, in the course of its duty, examined the question, and in passing a statute has held it valid. Modesty should forbid any inferior tribunal from setting aside this presumption. It should certainly forbid any single judge of such a tribunal from trusting to his own opinion against the views of large majorities in the Legislature, many of whose members may be his equal in ability and knowledge of constitutional law.

The fact that an argument has been had in this Court, and

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its members are equally divided, is a reason for not setting aside but for strengthening this rule. If the highest court of the State is unable to hold an act unconstitutional, surely no inferior judge should take upon himself that great responsibility. What presumption in him to put his opinion, not merely against that of the Legislature and the Executive, but against that of half this Court!

Considerations of public policy of great importance unite with those of modesty to prevent an inferior court from holding a statute invalid, which this Court after full consideration is unable to set aside. It is of the greatest consequence that the law of the State should be uniform, that one rule should be applied in every county. Especially is this true of the law for the collection of the public revenue. If taxation is not uniform, if men in every part of the State are not obliged to pay their due proportion, the feeling of injustice will be very great.

There is no way in which this uniformity can be obtained, no way to prevent one county from escaping taxation while another is compelled to pay its taxes, except by the adoption of a rule that no inferior court shall be allowed to set aside an act of the Legislature upon the validity of which this Court is equally divided. It seems to me then the plain duty of this Court, if the opinions of the judges remain unchanged by this argument, to reverse the decision of the court below and grant the decree asked for by the Auditor General.

So only can the State escape that utter confusion and injustice which must follow from having a law for the collection of the revenue valid in some counties, and invalid in others.

The court below ought at all events to have granted the decree asked, where there was no appearance.

The decree dismissed the petition wholly, and not merely as to Campau. It can be justified only on the ground that it is the duty of a court of its own motion to refuse to execute a law it deems unconstitutional, and not to wait until objection is made by a party interested. This is a very dangerous doctrine, especially as applied to inferior tribunals, and contrary to the well settled rule on the subject: Cooley's Const. Lim. (4th ed.), p. 199 et seq.

The judge of the court below, on the application of a taxpayer, whose interest in the matter was trifling, and on an argument in behalf of the public by a young man utterly unknown, presumed to decide that so far as Wayne county is concerned, the State should no longer collect the revenues

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necessary to its existence. Such presumption in an inferior tribunal ought to be rebuked.

The great importance of the questions at issue must be my excuse for presenting a brief so long. I have felt a great sense of responsibility to the State in its preparation. A very much greater responsibility now falls upon this Court. Very great interests depend upon the decision. I submit that the decree of the court below must be set aside, and such a decree entered as is sought by the Auditor General.

COOLEY, C. J. When the case of the Iron Cliffs Company was decided, I assumed—unwarrantably, it seems—that the judgment, though rendered by a divided court, would be accepted by the circuit judges as law and followed by this Court as a precedent, until it should be overruled by a majority of this Court. I have always supposed that was the proper course, and it seemed to me a course so necessary to a dignified and orderly administration of justice, that it never would have occurred to me that any other could be taken. Such a division of the Court is liable to occur at any time; and there are so many cases in which, by reason of interest, consanguinity or former connection with the controversy, some one judge is disqualified from sitting, that there would be constant liability to an equal division if the Court consisted of an unequal number. If, therefore, a decision made may be disregarded by a circuit judge because not made by a majority, we have and can have no settled law for the State at large, and each circuit judge will determine for himself conclusively what shall be the law for his circuit, and may make it different from the law of the adjoining circuit. This would so much resemble a judicial scandal that I should deem it my duty to prevent it by yielding my own opinion when the same question should come up again, if yielding should be essential to prevent such a consequence. The notion that there can be anything improper or opposed to good morals in a judge yielding his opinion when a proper administration of justice requires it, is one I do not quite understand. Judges are certainly doing that every day: it would be a great mistake to assume that every

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judgment in which a court unites, expressed in all respects the views of every concurring judge.

In this particular case the reasons for abiding by the first judgment are peculiarly strong, because the case is substantially the same. The State proceeds in each county separately to obtain an order of sale: if one proceeding had been provided for instead of several—as might have been done but for reasons of convenience—the doctrine of res adjudicata would unquestionably apply.

I have no inclination to go again into an examination of the legal questions. I have read with interest the opinion of my brother Campbell herewith filed, but I cannot see how it strengthens his former opinion. Much that my brother Sherwood says on the constitutional question I do not concur in, for the reason that it is distinctly opposed to the current of authority—and I may say to the almost unanimous consent of authority. The intervention of the judiciary in tax proceedings is provided for in many States, and is had and has been had for a great many years without question. I shall take the liberty of adding a reference to cases in a note to this.[1]

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[1] NOTE. The following is far from being a complete list of the cases referred to, but it is sufficient for the purposes of this note: *Hogins v. Brashears* 13 Ark. 242; *Merrick v. Hutt* 15 Ark. 331; *Patrick v. Davis* 15 Ark. 366; *Gossett v. Kent* 19 Ark. 603; *Wallace v. Brown* 22 Ark. 118; *McDermott v. Scully* 27 Ark. 226; *Mayo v. Ah Loy* 32 Cal. 477; *Wetherbee v. Dunn* 32 Cal. 106; *People v. Doe* 36 Cal. 220; *Reiley v. Lancaster* 39 Cal. 354; *Ertel v. Foote* 39 Cal. 439; *Mayo v. Foley* 40 Cal. 281; *People v. Shimmins* 42 Cal. 121; *Reeve v. Kennedy* 43 Cal. 643; *Jones v. Gillis* 45 Cal. 541; *Stokes v. Geddes* 46 Cal. 17; *Mayo v. Haynis* 50 Cal. 71; *Carpenter v. Gann* 51 Cal. 193; *Harper v. Rowe* 53 Cal. 233 and 55 Cal. 132: *Reclamation Dist. v. Evans* 61 Cal. 104; *Atkins v. Hinman* 7 Ill. 437; *Young v. Thompson* 14 Ill. 380; *Pitkin v. Yaw* 13 Ill 251; *Dunham v. Chicago* 55 Ill. 357; *Hills v. Chicago* 60 Ill. 86; *Otis v. Chicago* 62 Ill. 299; *Durham v. People* 67 Ill. 414; *People v. Otis* 74 Ill. 384; *Chiniquy v. People* 78 Ill. 570; *Thatcher v. People* 79 Ill. 597; *Mix v. People* 81 Ill. 118; *People v. Owners of Lands* 82 Ill. 408; *Prout v. People* 83 Ill. 154; *Beers v. People* 83 Ill. 488; *People v. Sherman* 83 Ill. 165; *Chicago & N. W. Railway Co. v. People ex rel. Miller* 83 Ill. 467; *Hess v. People* 84 Ill. 247; *Andrews v. People* 84 Ill. 28; *Pike v. People* 84 Ill. 80; *Weston v. People* 84 Ill. 284; *Fisher v. People* 84 Ill. 491; *Mix v. People* 86 Ill. 312; *Hale v. People* 87 Ill. 72; *Law v. People* 87 Ill. 388-9; *Graceland Cem. Co. v. People* 92 Ill. 619, 620; *Belleville Nail Co. v. People* 98 Ill. 399; *People v. Dragstran* 100 Ill. 286; *Gage v. Bailey* 102 Ill. 11; *Mann v. People* 102 Ill. 346; *Gage v. Parker* 103 Ill. 528; *Douthett v. Kettle* 104 Ill. 356; *Frew v. Taylor* 106 Ill. 159; *Mix v. People* 106 Ill. 425; *Egan v. Connelly* 107 Ill. 458; *Smith v. Hutchinson* 108 Ill. 662; *Parsons v. Gaslight Co.* 108 Ill. 380; *Stamposki v. Stanley* 109 Ill. 210; *Noble v. State* 1 Greene (Ia.) 325; *Scott v. Babcock* 3

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When my brother Sherwood says that due process of law "can never be made to mean less than the prosecution of a suit in our courts according to the prescribed and well-settled rules of practice for the purpose of establishing some right or determining the title to or the value of property; and no person can be deprived of his property against his will without it," he lays down a principle which is entirely proper in judicial proceedings, and which might be applied and enforced under this statute, but which has always been held entirely inapplicable in ordinary tax proceedings. Appealing to that principle, therefore, seems to me to be attacking his own general views as applied in this case.

Personally I have little care how this case shall be decided; but it seems to me that on constitutional questions the Court

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Greene (Ia.) 133; *Williams v. Gleason* 5 Ia. 284; *Bleidorn v. Abel* 6 Ia. 5; *Gaylord v. Scarff* 6 Ia. 179; *Detler v. State* 4 Blackf. 258; *Williams v. State* 6 Blackf. 36; *Pritchard v. Com'rs* 26 Kan. 584; *New Orleans v. Gottschalk* 11 La. Ann. 69; *New Orleans v. Jeter* 13 La. Ann. 509; *New Orleans v. Fisk* 14 La. Ann. 862; *Daily v. Newman* 14 La. Ann. 580; *New Orleans v. Heirs de St. Romes* 28 La. Ann. 17; *Irwin v. New Orleans* 28 La. Ann. 670; *Lavergne v. New Orleans* 28 La. Ann. 677; *Howell v. New Orleans* 28 La. Ann. 681; *Elder v. New Orleans* 31 La. Ann. 500; *Carter v. New Orleans* 33 La. Ann. 816; *Roberts v. Zansler* 34 La. Ann. 205; *Ex Parte Tax Sale &c* 42 Md. 196-7; *Guisebert v. Etchison* 51 Md. 478; *Steuart v. Meyer* 54 Md. 454; *Margraff v. Cunningham's Heirs* 57 Md. 585; *Com'rs v. Morrison* 22 Minn. 178; *Com'rs &c v. Nettleton* 22 Minn. 356; *State v. Jones* 24 Minn. 86; *County of Stearns v. Smith* 25 Minn. 131; *Aitkin Co. Com'rs v. Morrison* 25 Minn. 298; *Tidd v. Rines* 26 Minn. 201; *Keith v. Hayden* 26 Minn. 212; *Eastman v. Linn* 26 Minn. 215; *County of Chicago v. Railway Co.* 27 Minn. 109; *County of Washington v. German Bank* 28 Minn. 360; *Bower v. O'Donnall* 29 Minn. 135; *Everett v. Boyington* 29 Minn. 264; *Gilman v. Van Brunt* 29 Minn. 270; *Sanborn v. Cooper* 31 Minn. 307; *Kipp v. Dawson* 31 Minn. 373; *Stewart v. Colter* 31 Minn. 385; *Gutzwiller v. Crowe* 32 Minn. 70; *Coffin v. Estes* 32 Minn. 367; *Strassheim v. Jerman* 56 Mo. 105; *Carlin v. Cavender* 56 Mo. 286; *St Louis v. Bressler* 56 Mo. 350; *State v. Van Every* 75 Mo. 530; *State v. Sargeant* 76 Mo. 557; *Ewart v. Davis* 76 Mo. 129; *Raley v. Guinn* 76 Mo. 263; *Kansas City v. Railroad Co.* 77 Mo. 180; *Matter of 4th Ave.* 3 Wend. 452; *Matter of Albany St.* 11 Wend. 149; *Matter of 26th St.* 12 Wend. 203; *Matter of Furman St.* 17 Wend. 649; *Matter of Livingston St.* 18 Wend. 556; *Matter of Degraw St.* 18 Wend. 568; *Matter of Pearl St.* 19 Wend. 651; *Matter of John and Cherry Sts.* 19 Wend. 659; *Matter of William and Anthony Sts.* 19 Wend. 678; *Matter of Dover St.* 1 Cow. 74; *Striker v. Kelly* 7 Hill 9 and 2 Den. 323; *Embury v. Connor* 3 N. Y. 511, 523; *Matter of Broadway* 49 N. Y. 150; *Matter of Canal and Walker Sts.* 12 N. Y. 406; *King v. Mayor of New York* 36 N. Y. 182; *Rennick v. Wallace* 8 Ohio 539; *Wilkins' Lessee v. Huse* 9 Ohio 154; *Lessee of Barger v. Jackson* 9 Ohio 164; *Wilkins v. Huse* 10 Ohio 140; *Northrop v. Devore* 11 Ohio 359; *Therenin v. Lessee of Slocum* 16 Ohio 519; *Hess v. Potts* 32 Penn. St. 407; *Crandall v. James* 6 R. I. 144; *Perry v.*

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is drifting to this position: That those statutes are constitutional which suit us, and those are void which do not. My own views of the proper distinctions between legislative and judicial authority do not permit of my concurring.

CHAMPLIN, J. I concur in the foregoing.

CAMPBELL, J. As I stated my reasons for holding the proceedings in the circuit courts under the Tax Law of 1882 invalid in the case of *Iron Cliffs Mining Co. v. The State of Michigan*, I do not deem it necessary upon the present controversy, which involves no different considerations, to repeat them. The argument, except on the direct constitutional questions, was chiefly aimed at impugning the propriety of declaring laws unconstitutional where there is any serious

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Brinton 13 Penn. St. 202; *Campbell v. M'Iver* 4 Hayw. 62; *M'Carrol's Lessee v. Weeks* 5 Hayw. 246; *Francis' Lessee v. Washburn* 5 Hayw. 294; *Tharp v. Hart* 2 Sneed 569; *Thacker Ex Parte &c.* 3 Sneed 344; *Williams v. Harris* 4 Sneed 332; *Henderson v. Staritt* 4 Sneed 470; *Hightower v. Freedle* 5 Sneed 313; *Glass v. White* 5 Sneed 476; *Randolph v. Metcalf* 6 Cold. 400; *Quinby & Co. v. N. Am. Coal &c Co.* 2 Heisk. 596; *Anderson v. Patton* 1 Humph. 369; *Hamilton v. Burum* 3 Yerg. 355; *Anderson v. Williams* 10 Yerg. 234; *Bush v. Williams* Cooke 360; *Thomas v. Lawrence* 2 Baxter 415; *Douglass v. Mumford* 7 Baxter 415; *Nance v. Hopkins* 10 Lea 508; *Houston &c Ry. v. State* 39 Tex. 149; *Clegg v. State* 42 Tex. 605; *Morrison v. Loftin* 44 Tex. 16: *Morrison v. Chandler* 44 Tex. 24; *Belden v. State* 46 Tex. 103; *Edmonson v. Galveston* 53 Tex. 157; *Burns v. Ledbetter* 54 Tex. 374; *M'Clung v. Ross* 5 Wheat. 116; *Thatcher v. Powell* 6 Wheat. 119; *Woods v. Freeman* 1 Wall. 398; *Little v. Herndon* 16 Wall. 20; *Chicago Seminary v. Gage* 12 Fed. Rep. 398; *Davidson v. New Orleans* 96 U. S. 99; *Hagar v. Reclamation Dist.* 111. U. S. 701.

In *Davidson v. New Orleans* 96 U. S. 97, 105. Mr. Justice Miller says: "it is not possible to hold that a party has, without due process of law, been deprived of his property, where, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice, in *Kennard v. Morgan* 92 U. S. 480, and in substance repeated at the present term in *McMillen v. Anderson* (95 id. 37).

"This proposition covers the present case. Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper District Court of the State; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

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difference of opinion in courts or among judges. But as every judge is sworn to support the Constitution and nothing else, and as his duty to support the statutes must therefore depend on their conformity to the Constitution, I do not think, at this late day in American jurisprudence, that any judge is called upon to vindicate or explain his right or duty to decide such questions as on his official responsibility he is satisfied they should be decided. Whatever care is required of him in forming his conclusions, he is bound to act upon them when formed.

Neither is it true that any of the questions presented can be regarded as new. The division between judicial and administrative functions is radical and is found defined more or less clearly in all systems of jurisprudence. Powers that have been exercised since the beginning of the government by executive functionaries cannot be regarded as judicial; and under our Constitution, which expressly confines the judicial power to courts which are designated, and forbids each department to exercise any functions of the others except in the few specifically named cases, courts cannot become executive agencies. And if attempts are made to put controversies in the way of judicial decision, it must be by due process of law, which, when applied to courts, compels them to confine their action to cases where the methods conform to the settled principles of jurisprudence. I have previously given my reasons for the conviction that this proceeding is not due process of law, either executive or judicial. If the judgment here is held not conclusive, then it is in law no judgment at all, and leaves the court precisely where the Auditor General was left before. Finality is the clear object of the change. The action of the Supreme Court of the United States in refusing to treat the Court of Claims as a judicial body until its judgments were made final, is an illustration of this principle.

As parties on both sides, in the former controversy and in this, did not deny the power of the Legislature to employ commissioners to draft single laws, I did not then and will not now discuss that question, and it has been done on two

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or three occasions which have not been questioned, and are not likely to be. The question is under this law, and the law providing for the Commission, whether commissioners can be allowed to intervene in the actual work of legislation. That they have done so, in the most important functions of both bodies of the Legislature, I have endeavored to show heretofore and do not propose to discuss again. But it seems to be assumed by counsel that the objections to such private interference with legislation by commissions are novel.[1] Upon this matter it may not be out of place to refer to the legal history of the State, which indicates, on all of the questions involved here, more foresight than is now supposed to have existed.

The Constitution of 1835 contained no limitation on the number or quality of the courts which the Legislature might establish, and the full judicial power over certain classes of subjects was vested in some persons and bodies which, under our decisions, could not now be allowed to exercise it. The Legis-

[1] The Honorable *Nathaniel A. Earle*, a representative from Kent county in the Legislature at its extra session held in 1882 to consider the report of the Tax Commission, raised a point of order pending the vote upon the passage on its third reading, of House Bill No. 2, which bill was to repeal Comp. L. § 2527, prescribing the annual tax on street railway companies, and had been introduced by the message of the Governor as the work of the Tax Commission, "against the House at this time taking any action as to the bill in question, his objection to further action being that the bill had never been properly introduced into the House; that neither a member nor committee of either House of the Legislature had presented this bill; that by the Constitution of this State and the rules of the House, a definite method was provided for the introduction of bills; that the method had been entirely ignored, and that all future action had upon the bill will be entirely unauthorized; therefore the bill had no legal standing in the House."

The Speaker (the Honorable *Seth C. Moffat* of Grand Traverse), ruled "that the point of objection was not well taken; that under the law creating the Tax Commission, the bill, with several others, came from the Governor, as the work of such Commission; that the bill entered the House, with others, by special message opening this session; that the objection raised might be a question for the consideration of the House, but it was not an objection which could be sustained at this time by the presiding officer. Whatever opinion might be entertained upon the subject, the objection could be easily cured by deferring further action until the formal introduction by some member."

Mr. *Earle* appealed from the ruling of the chair.

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The judgment of the chair was sustained.

House Journal, 1882, pp. 139, 140.

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lature, as one of its earliest acts in the spring of 1836, before the judicial department of the State had gone into operation, and when the government was still imperfect, appointed Judge Fletcher, who had previously compiled the territorial laws, to prepare and arrange a code of laws for the State and report to the Legislature. Instead of a compilation, which it appears was all that the Legislature intended (see preface to Rev. St. 1838), he prepared a new and what was meant to be a complete Code, in separate chapters, whereby the law on several subjects was essentially revolutionized. Before the Legislature had acted upon it, some important matters were found to have been entirely overlooked, and the commissioner was given further time to report. An adjourned session was held in the spring of 1837, chiefly for the purpose of examining the chapters submitted, when it was found further omissions existed, which were mostly attempted to be supplied immediately by new reference and direction. At that session, after examination by the Legislature, the various chapters were adopted with some amendments, and two commissioners were appointed to arrange them under proper titles and publish them. Before those commissioners finished their task, some further omitted chapters were adopted and included by a new Legislature, and the Revised Statutes went into operation on the first day of August, 1838. Before the session of January, 1839, so many further omissions and defects were discovered that much of the time of the Legislature was spent in changing the Code, in some things radically and completely (as in the case of imprisonment for debt, where the reviser had not carried out the intent of his instructions), and in some supplying defects less extensive but not less serious. From that time until 1846 no session passed without a large amount of such amendment.

In March, 1844, the judges of the Supreme Court and the Chancellor were directed to appoint a commissioner learned in the law to consolidate and revise the general laws, who was to be united with the Chancellor and the presiding judge of the First circuit in a council of revision, and the result, as agreed upon by the council, was to be reported to the Legisla-

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ture. This report, which was chiefly the work of the able jurist who now presides over the Eighteenth judicial circuit, was reported to the Legislature of 1846, and left their hands very considerably modified, and in some parts changed altogether. This system, both as reported and as modified, introduced some radical changes, and the amendments rendered it more or less incongruous. It, however, like the Revision of 1838, superseded the great body of general laws on most subjects, and was intended to be a complete code. It did not escape the same fate of numerous changes in subsequent legislatures, although it was not found to require the same supply of original omissions. Nevertheless the confusion created by all this changing action was one of the chief causes of calling the Constitutional Convention of 1850, and among the things urged upon that body as important were the condition of the tax laws and the methods of legislation. Upon the former subject a number of efforts were made to give conclusive effect to tax proceedings and sales, and in every instance the propositions were rejected as illegal as well as arbitrary appropriations of private property. The difficulties of collecting land taxes were similar to those now asserted, and very much more serious in proportion. No argument has been put forth recently in favor of extreme measures which was not then used quite as strenuously. But it was not deemed wise to attempt to take away absolutely entire estates by summary and absolute forfeiture, without inquiry being left open into the legality of the confiscation. During the same convention a number of propositions were presented for the appointment of commissioners to prepare both general and topical revisions and codifications of all the laws, and of the law on certain subjects. It was further proposed to have commissioners appointed to compare existing laws with the new Constitution, and report the result to the Legislature. All of these were rejected by very decisive votes, and all of the objections made were based on the mischief of allowing laws to be changed except by the sole action of the Legislature, which, it was urged, could not be and had not been applied with full intelligence to extended

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schemes which reflected the minds of others, and could not, on their passage, be thoroughly compared and digested by the body of legislators so as to enable them to realize their full effect on the whole legal system of the State. And the result was that the Constitution was made to contain a provision, not only forever forbidding any general revision of the laws, but also requiring compilations to introduce no changes whatever in the statutes, and to be made and certified under adequate security against them. Article 18, § 15.

Several other articles were adopted, the general purpose of which was to make laws short and intelligible, and to prevent the passage of any act without having its meaning clearly and directly brought repeatedly to the attention of every member.

It cannot be said that the constitutional convention did not mean the Legislature to be protected against the substitution of the judgment of others for their own, and did not feel the danger of it. And if ever the preparation of bills in advance by legislative sanction is not forbidden, it is only because the language used applies to a general and not to a partial revision. But this omission does not leave the door open to the introduction into the actual work of legislation of a participation by persons not members, and not selected by any constituency for that purpose, and still less for admitting advocates on one side, with important authority in the direction of business, without making provision for having the other side represented or defended by any one.

The only previous instances in which such commissions have heretofore been created, are the Constitutional Commission of 1873, and the revision of the laws concerning cities and villages. In both cases very eminent men were chosen. The power to allow such action concerning the Constitution was not generally acquiesced in, and the popular sense rejected the whole scheme. The Village Law was found open to constitutional objections which did not occur to its distinguished compiler. And the experience of many years has shown that the voluminous city and village charters of which our statute books are full, have almost always been adopted by

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the Legislature on the faith of those who drew them, and have almost as uniformly turned out to be discordant and unwise in many of their provisions, and in many cases either unconstitutional or impracticable in execution. The propounders of new schemes have not kept in mind the necessity of making legislation harmonious either with other laws or with the Constitution, and have honestly in their zeal magnified benefits and failed to appreciate difficulties, which are not always on the surface, and will not occur to the minds of any but unprejudiced observers. These difficulties are not necessarily fatal obstacles to the existence of power to act, but they bear very strongly on the impropriety of treating an excess of power as frivolous and immaterial. I have said in my former opinion all that I care to say upon the power of receiving the commissioners into the full privileges of debate and consultation, and into a considerable control of the course of business of the two houses which represent here the principal functions of the ancient Parliament which derived its name from its debates and not from its laws, and was never very active in changing the laws, but inflexibly excluded outside interference as a breach of privilege.

I am of opinion that the decree dismissing the proceeding should be affirmed.

Sherwood, J. I am not insensible of the great and important interests, both public and private, to be affected by the final disposition of this case, and I believe I fully appreciate the serious consequences which may, possibly, finally follow an equal division of the members of this Court upon the question of the constitutionality of our general tax law presented in this issue. However much it is to be regretted that a decision by a majority of the Court cannot be made, still I cannot escape the conviction that it is my duty as a member of this Court, in this case as in every other, to act in accordance with the best understanding I can get of the question involved, uninfluenced by considerations of expediency or of policy. Entertaining these views, and having once passed judgment upon the questions presented,

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it is perhaps needless for me to say that I listened with intense interest to the able arguments so forcibly presented by the distinguished counsel on their review of the question upon the hearing of this case. And after having again given to the subject the most careful and thorough consideration of which I am capable, I am compelled to say that I am unable to arrive at any other or different conclusion than was expressed by my brother Campbell in the *Iron Cliffs* case, and to which I gave my assent. It is not my purpose now to enter into any re-discussion of the general question so ably treated in the opinion filed by him in that case.

There are certain great natural rights which are fundamental and pertain to every citizen in this country. One of these is the right to private property. The people have always been very vigilant in protecting these rights. Fearing that in some way or in some manner they might be impaired or infringed under one pretense or another in after generations, the fathers of our system of government, in making the organic laws of state and nation, secured the continued existence of these rights by express provisions in their Constitution. For the protection and enforcement of these rights courts were instituted, both of law and equity. When the court of law failed, in consequence of the rigid rules by which it was governed, to furnish the proper means of protection or redress, just at that point equity took cognizance of the matter under the flexible power exercised in that court, and the manner of exercising it which is found in the practice of these courts, which, under the various statutes adopted for that purpose, have long been well settled, and are older by far than the constitutions themselves. And these means of enforcement and protection of these elementary rights are what is called "due process of law." It can never be made to mean less than the prosecution of a suit in our courts according to the prescribed and well-settled rules of practice, for the purpose of establishing some right or determining the title to or value of property, and no person can be deprived of his property against his will without it. Such due process of law requires a person,

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when his property is sought to be taken from him in a court of law or equity, to be personally notified in some manner, if he is within the jurisdiction of the court, of the proceedings taken or about to be taken for that purpose. This law seeks, by a proceeding in a court of equity, to finally and conclusively, and without any opportunity for review, deprive the citizen of his property, he being within the jurisdiction of the court, and it may be living on the very property intended to be taken, without giving him any personal notice of the pendency of the suit. I regard this proceeding, as authorized by this law, not only a clear violation of the provisions of our constitutions, both state and national, but of the elementary principles upon which these provisions are founded. Here I leave this point, and should not have alluded to it only that some of my brethren did not regard the question of personal notice as properly raised upon the record in the *Iron Cliffs* case, and therefore declined to discuss it.

The other ground upon which I place my objection to the constitutionality of this law has been so well and ably discussed by my brother Campbell that I do not feel called upon to give it further attention. I am clearly of the opinion, however, that the manner in which the law was made was not only in conflict with the letter but the spirit of article 4 of our Constitution. The people are required to elect the persons whom they wish to make our laws, and they have fixed the number which shall compose each branch of the Legislature for that purpose. The Constitution gives the Legislature no power to select others, nor to authorize the Governor of the State to select others, to take seats upon the floor of each house and participate in the most important parts of legislation. It requires no peculiar sagacity to discover that such a commission with such privileges, composed of five of our ablest and most learned and influential citizens, would completely control the legislation of our State in very many cases and upon most important subjects. No one doubts, I apprehend, that such was the object and intention in placing the gentlemen who composed the com-

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mission which took a part in the enactment of the law in question. Five more unexceptionable men than those composing that commission cannot be found in our State; but I do not think, under our Constitution, the Legislature has the authority to thus abnegate the power conferred upon it, and transfer it to any other body not known to our Constitution or laws. In effect, it is an usurpation of legislative functions, and in direct conflict with the provision of our Constitution above last referred to. The review of the question upon this point more than ever confirms me in the correctness of the views I have herein expressed.

I cannot accept the suggestion of counsel for appellant that it is the duty of those members of this Court who do not believe the law to be constitutional to unite in a decision that it is, when the members of the Court are equally divided upon the question, on the ground that they have doubts or should have doubts, when in fact they have none. I do not believe the position sound either in law or morals. I know of no provision of the Constitution or of our statutes, nor of any practice, requiring any such thing to be done; but on the contrary, the law anticipates just such a condition of things as now occurs in this case, and directs just what judgment shall be entered by this Court, without requiring any member of the Court to stultify himself in the manner suggested. Neither do I anticipate any such results from the disposition of the case made as counsel for appellant fears may follow.

The objectionable features of the law, and the illegal manner of its enactment, have been generally and pretty fully discussed and pointed out. With these eliminated, and such other needful changes as will readily suggest themselves to the legislator, I apprehend no difficulty will occur in the enactment of a general tax law which will meet the requirements of the Constitution and the necessities of our people without depriving any citizen of his just and legal rights.

I concur in the opinion of my brother Campbell given in this case, and agree with him that the decree entered therein in the Wayne circuit by Judge Chambers should be affirmed.

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HUGH S. PEOPLES v. THE DETROIT POST & TRIBUNE CO.

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Libel—Bill of particulars—Justification—Special questions—Proof of murder—Newspaper privilege—Motive, malice and good faith.

1. A newspaper article, after stating that P. had murdered a certain girl, said she was known as P.'s woman and that he had told an alleged confederate that he need have no fears about her murder and had hired him to steal a sack, which he received [to put her body in]; that he had furnished a wagon in which to take her body to the river; that he had intimated to his wife that the girl had been murdered to get rid of her, and that he had confessed adultery to his wife, for which the wife had left him. *Held*, that these were all libelous charges, for which P. was entitled to damages unless it was proved that he had murdered the girl.

2. Two newspapers accused a man of murder and he sued them separately for libel. The affidavit of a convict that he was present when the murder was committed, was procured for one of the cases, but it conclusively appeared that he was elsewhere at the time sworn to, and the affidavit was not used. *Held*, that though it might perhaps be admissible in the other case to show defendant's good faith, it could not be used as proof of the murder.

3. The answer of a jury to a special question is of no account if based on testimony improperly received.

4. Evidence that one accused of murder was in the neighborhood where it took place at the time it was committed and was in such a situation that he might have committed it is not sufficient to show that he did it if no stronger motive is alleged than that he wished to hide an unlawful intimacy indulged before his marriage and to escape liability on a four-hundred dollar note.

5. Newspapers may discuss what relates to the life, habits, comfort, happiness and welfare of the people, and in doing so may state facts, draw inferences therefrom and express views upon the facts. Their deductions, even if false, are not actionable unless they cause special damages, but damage is presumed if they impute the commission of crime.

6. A newspaper statement imputing the commission of crime, but based on facts that have no legal tendency to prove it, is not privileged.

7. In an action for libel based on a newspaper article imputing the murder of a girl, defendant sought to justify by proving it. *Held*, that

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the plaintiff, on producing evidence that tended to show that the girl was the victim of an abortion procured by some one else, was entitled to have the case submitted on that theory, and it was error to exclude a question put to a competent witness as to whether the facts shown were inconsistent with death by abortion. *Held*, proper also to cross-examine one who had testified as to the victim's relations with the plaintiff, upon the impressions witness had received therefrom as to her feelings toward this person thus charged with her murder.

8. In an action for newspaper libel questions to the editor as to the purpose of the publication and the publisher's feelings toward the libelled person, and as to what the editor, before publishing the libel, had thought of its veracity, were admissible as bearing on the questions of damages and the malice or good faith of defendant.

9. Where a party has not been limited in his re-examination, the cross-examination thereon may properly be allowed the same latitude.

10. In an action for newspaper libel the editor was properly allowed to testify that at the request of plaintiff's counsel he had previously published a synopsis of the declaration in a similar suit brought by the same plaintiff against another paper.

11. Special questions may properly be submitted to the jury in a libel suit, if the case is a proper one for the jury, to determine whether defendant acted in good faith and with due care.

Error to the Superior Court of Detroit. (Chipman, J.) April 30.—September 23.

CASE. Plaintiff brings error. Reversed.

Jerome T. Johnson, *Geo. H. Penniman*, *F. A. Baker* and *C. I. Walker* for appellant.

John Atkinson, *Henry M. Cheever* and *Geo. V. N. Lothrop* for appellee.

SHERWOOD, J. This case was an action for libel, charging the plaintiff with the murder of Martha Whitla, and the commission of other crimes and offenses.

The article complained of as containing the libelous matter was published in defendant's paper of July 1, 1881, at the city of Detroit. It contains, substantially, the following charges: (1) That the plaintiff had kept Martha Whitla as his housekeeper and his mistress; (2) that he wanted to get rid of her and prevent her from collecting a note she held

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against him for about $400; (3) that he had committed fornication with her; (4) that she was reputed to be the plaintiff's woman; (5) that the plaintiff told one Cronin, who aided him in making preparation for her murder, that he need have no fears because she had been murdered; (6) that plaintiff had employed Cronin to steal a sack to be used about the murder; (7) that plaintiff received the sack, knowing Cronin had stolen it; (8) that plaintiff furnished Cronin with a wagon to take the body to the river in after she had been murdered; (9) that previous to the murder plaintiff's wife had left him because he committed adultery with Martha; (10) that afterwards plaintiff admitted to his wife that he had committed adultery with the girl, and at the time intimated to his wife that Martha had been murdered to get rid of her; and (11) that plaintiff paid money to convict other parties as Martha Whitla's murderers, knowing them to be innocent.

The defendant pleaded the general issue and gave notice under it that the truth of the alleged libelous statements would be proved upon the trial. Subsequently the court made an order to the effect that the defendant file a bill of particulars of the matters the truth of which it proposed to prove under the notice given; and thereupon counsel for defendant, in pursuance of such order, filed a bill, giving in substance the following: (1) That about January 11, 1879, Martha Whitla was in fact murdered at Detroit, and thrown into the river; (2) that on the 12th of March, 1879, her body was found, but not for some time identified; (3) that she had been the housekeeper and mistress of the plaintiff; (4) the truth of the statement in the article concerning the publication by the *Evening News* and the suit thereon; (5) that an investigation was in progress in the police court, in which Marsh was a witness to the matters stated in the article to be provable by him, and that those matters are true; (6) that Martha Whitla was brought to Dearborn by Henry Theiss, January 10, 1879, taken to Detroit next day by Dr. Collar, and was never seen alive after that afternoon; (7) that the plaintiff contributed $150 to promote the prosecution of

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the Theiss boys; (8) that the foregoing facts created and justified a belief by defendant that plaintiff had knowledge of and consented to said murder, and defendant will prove that plaintiff had such knowledge and did so consent.

A number of the alleged libelous charges are not mentioned in the particulars furnished as those to be justified on the trial, among which are what the plaintiff is alleged to have said to Cronin about his need of fear and that the girl had been murdered; that plaintiff employed Cronin to steal the sack, and received it from him, knowing it to have been stolen; that the plaintiff furnished a wagon to take the murdered girl's body to the Detroit river; that plaintiff's wife left him because he committed adultery; that he confessed that crime to his wife and intimated to her that Martha had been murdered to get rid of her, and that Martha was known as Peoples' woman. The record purports to give us the substance of all the testimony taken at the trial, and, as appears therefrom, the justification of these last-mentioned libelous charges was substantially abandoned as no evidence seems to have been given upon either of them. These were all libelous charges, and unless the murder of Martha Whitla by the plaintiff was proved by competent evidence it is difficult to see why the plaintiff should not have been entitled to a verdict.

The murder was not admitted by the plaintiff, neither was there any legal testimony in the case tending to show the plaintiff guilty of the homicide. The affidavit made by Cronin[1] was not proper testimony on that point and it should

[1] The defendant introduced in evidence an affidavit of Charles J. Cronin, a copy of which is hereinafter given. It appeared, however, that the original affidavit is in the hand-writing of Charles H. Freeman, an attorney for the *Evening News* in another suit brought by the present plaintiff, and was obtained by said Freeman while said affiant was in the House of Correction at Ionia; that the affidavit was taken before the trial of the case against the *Evening News;* and that Freeman subsequently ascertained that at the time of the supposed murder the affiant, Cronin, was in the Reform School at Lansing.

The affidavit is in the following words:

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE. }

Charles Cronin, being duly sworn, says that during the month of January, 1879, and about the middle thereof, he met Sparling, George F., at 147 Michigan avenue. Sparling talked with me and wanted me

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not have been admitted for that purpose. It is the only testimony that tends to show that the plaintiff was knowing to the commission of the crime charged; and while admissible, perhaps, to show good faith on the part of the defendant, it was not competent evidence of any of the facts therein stated. The answer of the jury to the special questions submitted to them upon this point has no bearing upon the case, inasmuch as it was based on testimony improperly received. I think the plaintiff's second request to charge should have been given upon this subject, and its refusal by the court was error. The request was as follows: "There is not sufficient evidence to authorize the jury to find that the plaintiff was guilty of the murder of Martha Whitla, or that he had knowledge thereof or was connected therewith."

Before it can be said that evidence preponderates showing a party to have committed the crime of murder, there must

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to assist him in taking a body to the river Rouge, and that he and Peoples' hostler were to strangle a girl, named Martha Whitla, who was coming from the country. He asked me to go with him to see Hugh S. Peoples, which I did. We went to Peoples' barn on the corner of Fourth street and Beech, where we found Peoples. He and Sparling talked together a while, and then Peoples asked me if I was willing to take the body to the Rouge. Informed him that I was, and he set the time for us to be at Mrs. Snyder's at 12 o'clock (this was about noon), saying he would have her there at that time ready. About 12 P. M. I hitched up my horse to a wagon owned by Peoples, and at his barn, and hostler and myself drove over to near Mrs. Snyder's. When we went up there I found Martha Whitla sitting in a chair near left hand corner of room. She seemed to be in a stupor. Sparling was sitting near her, and near Sparling, looking out of a window, sat Hugh S. Peoples. Mrs. Snyder and Mrs. Marsh sat near next window. When we got into the room, Peoples nodded to Sparling and the hostler, and they took hold of Martha, and commenced to strangle her. This seemed to wake her up, and she commenced to struggle, and rose to her feet. She was then pushed over by them, and fell on the floor, and they put their knees on her breast and choked her until she ceased to move. Peoples then came over where she lay and bent over her. I then went down to the wagon, and she was tied up and brought down and put in the wagon. Sparling and the hostler got in. We drove to the Rouge bridge. Sparling and the hostler took her out and went down on the ice and put her in the river. We then took the wagon back and separated.

CHARLES J. CRONIN.

Sworn to and subscribed to before me this 16th day of January, 1880.

EDWARD G. RAYMOND,
Notary Public,
In and for Ionia County,
Michigan.

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be some evidence tending to show the fact; and when the testimony shows no more than that the party accused was in the vicinity of the crime at the time when it is supposed to have been committed, and in a situation where he might have committed it, with no stronger motive for so doing than to conceal a supposed lascivious intimacy before marriage and to escape responsibility on a note for $400, it does not rise in consequence to the plane of evidence, and should not be submitted to the jury to be weighed by them. This is all that can be properly claimed for that offered as it appears upon the record in this case.

There can be no question at this late day but that the public newspaper has the right (whether it shall be regarded as its duty or not) to discuss those matters which relate to the life, habits, comfort, happiness and welfare of the people. In doing so it may state facts, draw its own inferences and give its own views upon the facts. It may err in its deductions, and if they are false they are not actionable unless special damages can be shown; but false assertions when they impute the commission of crime, are actionable, and when not based upon any facts legally tending to prove the crime imputed the publication cannot be said to be privileged, and such I think is shown to be the case in this record so far as it is sought to connect the plaintiff with the alleged murder. It will not do to say that such a publication was made with reasonable care, however good the motive may have been. The public welfare never required any such reckless disregard of the sacred right of enjoyment of a pure and spotless reputation, which no amount of property can command and which it often takes its possessor a life-time to secure.

The record shows that Martha Whitla was last seen alive in Detroit on the 11th day of January, 1879; that on that day it appears undisputed that she consulted Dr. Duffield, and he made a physical examination which indicated that she was probably pregnant; that such were the indications from what she said to him, and that she wished him to give her medicine to secure a recurrence of the menses, which he refused to do. It further appears from the testimony that she started with

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one of the Theiss boys for Dearborn, on the 10th day of January, and on the next day went into Detroit. Dr. Collar says he took her from Dearborn to Detroit on the 11th of January, and the testimony tends to show that she was seen on that day in a buggy with Henry and John Theiss, and that she claimed a marriage engagement with the latter; that she had passed a considerable part of the time during 1878 at his father's house, or near there; and that it was the opinion of several physicians that she had at some time previous to her death been delivered of a fœtus or child.

It was claimed by plaintiff, from these and other circumstances, that there was evidence before the jury in favor of the theory that her death was the result of an abortion. I think there was testimony in the case showing facts in that direction, and tending to support such a theory. The court, however, precluded the jury from the consideration of this being the cause of her death when he instructed them that there was no doubt but that the girl was murdered; and this is claimed as error, and I think it was clearly such. But I do not find any assignment of error covering that part of the charge; neither do I find any request refused relating to the subject by counsel for the plaintiff.

There was, however, a question put to Dr. Yemans by plaintiff s counsel embodying the facts claimed to have been disclosed upon the post-mortem examination and upon the trial relating to this subject, which was objected to, and the objection sustained, which the witness should have been permitted to answer. The question was, whether or not the facts thus "stated were inconsistent with death from abortion." The record shows no ground stated for the objection. The hypothesis contained in the question was sufficiently supported by the testimony. There was no question made of the doctor's ability as an expert, and the question was a proper one as the case then stood. Not only had the plaintiff the right to have the case submitted to the jury upon the theory that the death of the girl was produced by abortion, but also to sustain such theory by any proper testimony for that purpose. I think the exception to the ruling of the court on this question was well taken.

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Mr. William Stocking, managing editor of the defendant's paper at the time the libelous articles were published, was sworn on the part of the plaintiff and testified by whom the article was prepared; that he had conversations with their reporter and city editor before it was published, and as to the circulation of the paper. Upon the cross-examination witness further testified that the city editor, Mr. Irland, gathered the substance of the information upon which the article was based; that he did not at that time know the plaintiff, and had never heard of him except in connection with the matter of the publication. The witness was then asked the following questions by counsel for the defendant:

"Was there any feeling on the part of the newspaper against him personally?"

"What was the object of the publication of these facts?"

"At the time of the communication to you of the facts, made by them, please state what your own state of mind was in respect to believing them to be true and important?"

These questions were all objected to as incompetent, and the first, also, as not proper cross-examination. Although by the course pursued, the plaintiff's interrogatories were upon examination, the record does not show he was limited in the investigation, or in any manner prejudiced thereby. I think the objections were not well taken. The testimony called for tended to show the motive and good faith of the defendant, and as such would certainly have been competent on the question of damages, as well as to show there was no malice on the part of defendant. There was no error in admitting the answer of the witness Irland[1] to the question: "Will

[1] *Fred. J. Irland*, city editor, testified as to the publication of the alleged libel, and on cross-examination said that neither plaintiff nor his counsel had communicated with him to correct the statements made in the article, which was published July 31, 1881, a year and a half after the murder; that the suit against the *Evening News* was commenced several months before, and George H. Penniman, who was the attorney for Peoples in that suit, came to witness, and requested him to publish something in relation thereto in behalf of Mr. Peoples, and that witness did publish it. Defendant's counsel thereupon asked:

"Will you please state what that was?"

This question was objected to as having nothing to do with the case, but the objection was overruled and an exception taken, and the witness replied:

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you please state what that was?" It related to the publishing of the declaration in the case against the *Evening News*, and tended to show why the publication was made. It was relevant.

Witness Stringer was interrogated as to the relations of Martha Whitla and her conduct towards the plaintiff, and on his cross-examination was asked: "What impression did her conduct make upon your mind, as to her feelings towards Peoples?" This was objected to as incompetent. It was proper. Her conduct and feelings were material. It had a bearing upon the truth of a portion of the libel charged, and the fact called for frequently becomes perfectly apparent when the circumstances leading to such conclusion are most difficult to describe. *Evans v. People* 12 Mich. 35.

I am unable to perceive anything improper in the questions[2] submitted to the jury by the court for specific answers. They were material facts in the case to be found by the jury (if the case was proper to be submitted to the jury), and either party had the right to a special finding upon each of them.

Something more might be said as to the several charges contained in the libel other than that imputing participation by the plaintiff in the alleged murder, but the views already expressed sufficiently indicate all that is necessary in now disposing of the case.

I think the judgment of the Superior Court should be reversed, and a new trial granted.

The other Justices concurred.

"On the day when Major Penniman filed the declaration in the case against the *Evening News*, he came to me and handed me a copy of the declaration, and said he wished I would publish it in the paper, and I published a full synopsis of the manuscript which he gave me."

[2] The special questions submitted to the jury on the part of the defendant were as follows:

Do you find that the paper published the article declared upon in good faith?

Do you find that the defendant exercised due care in collecting the facts published, and published them as matters of public interest, and without actual malice towards the plaintiff?

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Hiram Marble v. Henry O. Price.

Adverse possession—Exclusive occupancy—Estoppel from disputing plat after buying according thereto.

1. Adverse possession cannot arise until there is some one to dispute the right claimed.
2. One who buys lots which his deed describes according to a recorded plat is estopped from disputing the dedication and acceptance of an alley which appears thereon as bounding his lots and passing between them; and the mere occupancy by him of the space designed for the alley, without claim or color of title, does not establish an adverse possession until the interests of some one else are affected by it, nor will it entitle him to maintain trespass against a neighboring lot-owner for driving through the alley and tearing down obstructions placed there to prevent his using it.
3. Adverse possession requires exclusive occupancy known to and against the will and consent of those who are interested and have a right to contest the possession.

Error to Bay. (Green, J.) June 5.—Sept. 23.

Trespass. Plaintiff brings error. Affirmed.

Holmes & Collins for appellant. Adverse possession on an alley long enough to bar ejectment will bar the use of the alley and an action for its obstruction: *Corwin v. Corwin* 24 Hun 147; *Baldwin v. Buffalo* 29 Barb. 396; *Ferguson v. Witsell* 5 Rich. (S. C.) 280; *Commissioners v. Taylor* 2 Bay 282: 1 Am. Dec. 647; *Alves v. Town of Henderson* 16 B. Mon. 131, 172; *Rowan v. Portland* 8 B. Mon. 232, 259; *Knight v. Heaton*, 22 Vt. 480.

McMath & Cobb for appellee.

Sherwood, J. The plaintiff brought trespass for injury to land he claimed to own, now located in Bay City, but which was platted and called in 1856 the Daglish division of Portsmouth. The ground upon which the trespass is alleged to have been committed is a strip twenty feet wide, running through block 106 from north to south, and platted as an

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alley when the division was made. City lots one and two in the block lie on opposite sides of the alley.

The case was commenced in justice's court, where the defendant pleaded title, and it was certified by the justice to Bay circuit for trial. The injury complained of was the defendant's going upon and using the alley with his teams and wagon, in passing over it, and in breaking and removing obstructions from the alley between lots one and two. The defendant had judgment at the circuit, and the plaintiff brings error.

It appears from the record that, when the block was platted in 1856, it was in an open field, unfenced; that the plat was duly filed and recorded in the proper county; that block 106 contained twelve lots, and that the alley between them formed a portion of the boundary of each, six lying on each side thereof; that shortly after making the plat Daglish sold the block to Mary Ann Miller, who went into possession of the land and so continued until August, 1862, when she sold, by contract, to the plaintiff lots one, two, eleven and twelve, and in February, 1863, she executed a conveyance of the lots contracted, with warranty, describing them by their platted description, to the plaintiff; that, up to the time plaintiff took possession, the lots sold to him continued in an open pasture field, with no designation as to streets or alleys or boundaries other than appeared on record from the said plat.

It further appears that the defendant from April, 1883, until the time the suit was commenced, was the owner and occupant of lot eight in said block, and derived his title thereto from one of the earliest owners, after the plaintiff purchased his lots, and as such owner and occupant claimed the right to use the alley for the purpose of travel between lots one and two. The testimony of the plaintiff tended to show that the plaintiff, from the time he took possession, claimed there was no alley between the lots, and the land on which it was platted was his, and that he used and occupied the same as part of his property to the exclusion of others and adversely to the public, and that it had not been used as a public alley.

The defendant's testimony tended to show that parties

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other than the plaintiff had bought and occupied lots in the block for fourteen years previous, and that during all of said period said persons and the public had continuously passed over and used said alley as a public alley, and there was testimony given to the effect that the plaintiff told defendant's grantors, who occupied lot nine in said block, that there was an alley there through which he could have access to his lot; also that plaintiff said he had no claim to the alley, but if he could hold it by possession he would do so.

The record discloses no deed or conveyance of the locus in quo to the plaintiff. By the description in his deed the alley is necessarily excluded, and he bases his right to bring suit upon his right acquired by possession. The question of the plaintiff's exclusive right to the use of the alley, by possession, was by the court, upon the evidence, submitted to the jury, and their verdict is against the plaintiff.

This would seem to settle the question, the plaintiff having no deed of the land upon which the alleged trespass was committed. But the plaintiff claims the judge erred in his instructions in submitting the case to the jury. No exception appears to the admission or rejection of the testimony, a part of which only is given in the record.

The court charged that the adverse possession claimed by plaintiff could not begin to run until other parties became interested in and occupied a portion of the block. This is excepted to. Under the facts as they appear in this case we think the charge is correct. The plaintiff did not claim to occupy the land at any time under title or color of title. A naked occupancy, which was not exclusive, is all that is shown, with no claim of title, not even of adverse holding, until a short time before suit was brought. Such occupancy without claim or color of title is not adverse or inconsistent with the right of the defendant and the public to the use of the land as a street or alley. After dedication and acceptance, neither of which can the plaintiff, under his deed, be heard to dispute, it requires more than such an occupancy to create adverse possession. The occupancy must be exclusive, known to and against the will and consent of those

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interested, and whose right it is to contest. *Bridges v. Wyckoff* 67 N. Y. 130; *Sinclair v. Comstock* Har. Ch. 412; *Baker v. Johnston* 21 Mich. 319.

Under the testimony, as it appears on this record, it may be questionable whether sufficient was shown to warrant the court in submitting the case to the jury, because the plaintiff's right relied upon rests wholly upon adverse possession, and this cannot be established by inference, but the proof must be "clear and cogent." *Yelverton v. Steele* 40 Mich. 541; *Brandt v. Ogden* 1 Johns. 156; *Coburn v. Hollis* 3 Metc. 125. No harm, however, has been done by the submission, as the verdict is against the plaintiff. In the remaining four exceptions argued we discover no error.

The judgment must be affirmed.

The other Justices concurred.

EDWARD R. RAYNETT, F. WILLIAM STANDALL AND MARY E. STANDALL v. HAMILTON BALUSS AND BARBARA BALUSS.

Land transfer by an incompetent.

A flighty old man deeded his homestead to his daughter and her husband and they gave him back a life lease of it and were to support him. But they all lived together and quarreled frequently, and finally the son-in-law fell upon him and smote him and drove him out. The old man then went to a lawyer, whom he begged to give him a home, and he promised to deed the land to the lawyer if the latter would get it back. The son-in-law was induced to surrender the land to save himself from prosecution for the assault he had committed, but he proposed to deed it back to the father-in-law. The lawyer, however, said it should be deeded directly to him, so that the old man's wife should not acquire a dower interest in it. The old man and his wife had separated, and the son-in-law claimed to have paid her for joining in the first deed, and he refused to deed to the lawyer unless the latter would make good that payment. An arrangement was finally made on that basis, and the lawyer gave his note for the amount and a mortgage on the land to secure it. The old man then went to live with the lawyer, but on the next day left him, and he

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and his daughter and son-in-law filed a bill to set aside the deed to the lawyer as having been obtained by fraud. *Held*, that as on the evidence the old man was incompetent to do business and everybody knew it, not only that deed but all the others should be set aside and the note and mortgage declared void, and the land deeded back by the lawyer to the old man, whom the Court recommend to guardianship. But as no fraud appears on the lawyer's part as against the son-in-law and his wife, the bill should be dismissed as to them with the costs of solicitors' fees in both courts to the defendant, while the old man should also recover the costs of both courts.

Appeal from Wayne. (Jennison, J.) June 5.—Sept. 23.

BILL to set aside deed, etc. Complainant appeals. Affirmed, with modifications.

Moore & Moore and *Ervin Palmer* for complainant. An attorney is bound to serve his client's interest, and the law will closely scrutinize transactions between them: *Gray v. Emmons* 7 Mich. 538: Story Eq. Juris. § 310; *Briggs v. Withey* 24 Mich. 136; *Boxheimer v. Gunn* 24 Mich. 382; *Hooker v. Axford* 33 Mich. 456; *Roman v. Mali* 42 Md. 513; *Haight v. Moore* 37 N. Y. Sup. Ct. 161; *McMahan v. Smith* 6 Heisk. 167; he buys outstanding titles for his client's benefit: *Smith v. Brotherlin* 62 Penn. St. 461; *Linsley v. Sinclair* 24 Mich. 380–2; *Hooker v. Axford* 33 Mich. 456; *Payne v. Avery* 21 Mich. 524; *Cameron v. Lewis* 56 Miss. 601; *Roman v. Mali* 42 Md. 513.

Hamilton Baluss, *Simon R. Harris* and *Henry M. Cheever* for defendants.

CHAMPLIN, J. The bill of complaint was filed in this cause for the purpose of setting aside a deed executed by F. William Standall and Mary E., his wife, to defendants, bearing date October 19, 1882, conveying to them the southwest quarter of the southwest quarter of section seven, in township three north, range nine east. Raynett had owned these premises since 1862, and had occupied them as a homestead. Complainant, F. William Standall, is a son-in-law, and Mary E. Standall is a daughter, of Raynett. In January, 1881, Raynett and his wife conveyed the premises to William F. Standall and Mary E. Standall, they giving back to Raynett a life-lease of the property. Although there was no agree-

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ment in the papers which passed between Raynett and his son-in-law and daughter, for the support of Raynett, it was understood that they were to support him, and they lived in one family upon the premises. Raynett appears to be a weak-minded old man, who cannot give his age exactly, but says it is sixty-odd years. He has been regarded by his neighbors, for the past six years, as incapable of transacting business, and we are quite satisfied, from the testimony, that Mr. Raynett, at the time of the transactions referred to in the bill of complaint, was an imbecile, and incapable of entering into or making a binding contract. His first wife had died some six years before and he had married again and separated from the second wife. He was a weak and fickle-minded old man, a believer in dreams, and an easy subject to crafty or designing men. It appears that after he had conveyed the land to his son-in-law and daughter frequent quarrels sprung up between them, and his son-in-law had committed an assault and battery upon him, and abused him to such an extent that, fearing for his life, he had fled from the house.

He had applied to the defendant, Hamilton Baluss, for advice and protection, and requested him to provide a home for him. Baluss was an attorney, residing at Wayne, and was well acquainted with Raynett. He knew his fickle-mindedness, and at first refused to have anything to do with him. Raynett wished to get back the land he had conveyed to Standall and wife, and requested Baluss to assist him in so doing, and authorized him to pay Standall not exceeding two hundred dollars for a deed. And in case he should succeed he offered to convey the land to Baluss if he would support him and provide him a home. At the time Raynett left the premises for fear of his life, he applied to a justice of the peace by the name of Walker, and made complaint, and caused Standall to be apprehended to find sureties of the peace. At the same time he again applied to Baluss and besought him to provide him a home in his family. Mr. Baluss declined, without his wife consented to the arrangement, and as she was absent from home her consent could not be obtained until she returned, which was within a cou-

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ple of days. Raynett prevailed upon her to consent to his proposition, which was that he should convey the premises to Mr. and Mrs. Baluss, and they should provide him a home in their family. Standall was arrested and brought before the justice. He employed Z. S. Knickerbocker, an attorney at Wayne, to defend him. The examination was postponed until afternoon, and in the meantime it was made known to Standall that if he would reconvey the premises to Raynett, the proceedings against him would be discontinued. This he agreed to do, and requested Mr. Knickerbocker to prepare a deed for himself and wife to execute, which was done.

On showing this deed to Mr. Baluss he objected to it, and stated that the deed should be executed to himself and wife, instead of Raynett. Standall refused to execute the deed to Mr. and Mrs. Baluss, unless Baluss would pay him one hundred dollars, which he claimed he had paid to Raynett's second wife to induce her to join her husband in the deed to him and Mrs. Standall. Baluss claimed that it was Mr. Raynett's wish that the property should be conveyed direct to him and wife, and one reason was that, if conveyed to Raynett, the dower interest of his wife would again attach to the land. It was finally arranged that the deed should run to Mr. and Mrs. Baluss and they should give back a note and mortgage to Standall for one hundred dollars, payable on or before three years after date. This was on the 19th day of October, 1882. Raynett went to defendants and stayed that night, and the next morning he stated he had a dream, and there was going to be trouble, and wanted the papers fixed up. Baluss thereupon went to his office and drew up in duplicate an agreement in reference to his support, as follows:

"Memorandum agreement made and entered into this 19th day of October, A. D. 1882, between Hamilton Baluss and Barbary Baluss of the one part, and Edward Raynett of the other, witnesseth, that the said several parties heretofore, and in consideration of the convenants hereinafter contained, respectfully agree: *First*, that whereas, the said Hamilton Baluss and Barbary Baluss having acquired the title in fee to the south-west quarter of the south-west quarter of section seven, in the township of Romulus, Wayne county, and State

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of Michigan, and the said Edward Raynett holds a life lease of said lands, now it is mutually covenanted and agreed as follows: The said parties of the first part shall board, lodge and do all necessary washing, and decently clothe the said party of the second part so long as the said party of the second part shall see fit to remain and live as one member of said Baluss' family at his house; and the said party of the second part, in consideration of the above covenants, agree that, so long as he shall live with the parties of the first part, as above provided, that the said party of the first part shall have the right of possession and control, and the rents, profits and use of said described lands without other remuneration. And whenever the said party of the second part shall, from any cause, choose to occupy said lands himself, the said party of the first part shall not be liable for the support of the said party of the second part, but the said party of the second part then and thereafter shall be entitled to possession of said lands at the end of any farm year, to wit, on the first day of April thereafter, the intention of this instrument being to give the said party of the second part the privilege of living with said Baluss, and be kept by them as aforesaid, and said Baluss having the use and control of said lands, and said Raynett to occupy and control said lands under his life lease, giving to said Baluss the right to enter upon said lands at any time to make needful repairs on said lands or any improvements thereon while said party of the second part may be in possession of the same.

Witness our hands and seals the day and year above written.

_____ [L. S.]
_____ [L. S.]
_____ [L. S.]"

He requested Samuel W. Walker, the justice, to go with him and witness the execution of the instrument by himself and wife. On arriving at the house they found complainant Mary E. Standall there endeavoring to entice her father away, and he refusing to go with her, saying "the die is cast." They read over the above agreement to Mr. Raynett, and he said it was all right, but he would not sign it then, and at the importunities of his daughter he departed with her, and soon after this suit was commenced. The bill charges that the obtaining of the deed, running to defendants as

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grantees instead of to Edward Raynett, was accomplished by the fraud of the defendant Hamilton Baluss, "and in violation of the just rights of complainants." The bill also contains the following statements:

"That said Edward R. Raynett is an old man and quite weak in body, and quite deaf, and was at the time said conveyance was made from said Standall to Baluss and wife; and said defendant Hamilton Baluss took advantage of said Edward in said transaction and procured said deed to himself and wife by fraud, concealment and deceit; that said Mary is a daughter of said Edward, and is with her husband, said William, occupying said land with him, and that by the deed executed to said Hamilton and Barbara Baluss as aforesaid, they, said William and Mary, are made to covenant and agree with the grantees therein that they are seized in fee of the land thereby conveyed; that the same is free from all encumbrances; and that they would warrant and defend the title to the same to the grantees therein, their heirs and assigns forever, against all lawful claims whatsoever of other persons; that said warranty is false, in that the lease of the premises made to said Edward as aforesaid, for the term of his life, is a lawful claim in his favor against the same. Complainants further show that the said deed made to said Hamilton and Barbara Baluss is void for the fraud of said Hamilton in the obtaining thereof; that the same is a blot and cloud on the title of the said William and Mary to the premises above conveyed, and injurious to said Edward, in that, by it, the said Hamilton and Barbara Baluss seek to deprive him of the title said William and Mary were willing to convey to him, and are ready and willing and hereby offer to convey to him, if the obstruction caused by the same be removed."

And the relief prayed for is that the deed made by F. William Standall and Mary E. Standall be decreed to be void, and that it be set aside and held for nought, and that said Hamilton Baluss and Barbara Baluss release and convey to said F. William Standall and Mary E. Standall all the title, claim and interest purported to be conveyed to them by the last-mentioned deed, and in default of their executing such release, then such decree to operate as a release and conveyance.

So far as the charge of fraud is based upon the fact that Mr. Baluss obtained the deed to be made to himself and wife,

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instead of to Mr. Raynett, the proof conclusively shows that it has no foundation whatever. We are entirely satisfied that it was fully understood that the deed was to be made direct to Baluss and his wife, and that such was Raynett's special request, the object being to prevent the second wife from setting up any claim of dower, which she might be inclined to do if the deed was made to Raynett. The charge that the warranty from Standall and wife to defendants "is false, in that the lease of the premises made to said Edward for the term of his life is a lawful claim in his favor against the same," is equally without foundation, for the reason that the covenants of warranty in that deed expressly excepted from their operation the life lease which the grantors had executed to Raynett, and bound defendants to protect them against it.

The transaction, however, cannot be upheld, for the reason that Raynett was not of sound mind; that it had become weakened, by age or some other cause, to that extent that he was incapable of comprehending the terms and effects of the contract, which, it is claimed by defendants, he entered into. Of this imbecility on the part of Raynett, defendants had full knowledge, and it is quite apparent that defendant Mr. Baluss took advantage of this weakness in obtaining the conveyance of the land under the contract he had drawn up for Raynett and himself and wife to execute. With his knowledge of Raynett, and of his changeful disposition, he must have contemplated that in all probability in a very short space of time Raynett would choose to return to his place and remain there, in which event defendants would have secured the title to the farm without any adequate consideration. The agreement was too one-sided to commend itself to a court of equity; and, in view of the facts and the confidential relations which existed between Mr. Baluss as the attorney of Raynett, the conclusion cannot be avoided that he made use of this want of intelligence and this confidence to obtain Raynett's consent to a bargain which operated to do positive wrong to him. *Mason v. Dunbar* 43 Mich. 410.

We have not overlooked the evidence of Mr. Baluss that

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he did not occupy the position of attorney for Mr. Raynett. We have no doubt, however, that Raynett considered him employed, and it is quite evident from Mr. Baluss's own testimony, with reference to interesting himself for Raynett in obtaining a reconveyance from Standall, that there was good ground for Raynett to consider such relation as existing. We agree with the circuit court in decreeing the deed from Standall and wife to defendants and the note and mortgage growing out of the same transaction, to be void and of no effect. We are also satisfied from the evidence that the deed set out in the bill from Edward Raynett and wife to F. William Standall and Mary E. Standall is also void for the same reasons that apply to the deed from the Standalls to defendants, namely, the incapacity of the complainant Raynett to make a binding contract of sale. There does not appear to have been any consideration whatever paid by the Standalls to Raynett for the conveyance to them by Raynett of the land in question.

In any view which can be taken of the case, the complainants F. William Standall and Mary E. Standall have no right to the relief prayed for. They were not defrauded by any undue advantage taken by Mr. Baluss of Raynett. We have found that there were no misrepresentations as charged. The conveyance to defendants was their voluntary act. When the complainant F. William Standall was informed that the deed was to be made to the defendants, instead of to Raynett, he took advantage of the situation to demand and obtain a note from defendants, secured by a mortgage on the premises of Raynett. He states in his testimony that he gives up all claim under this note and mortgage, and in his bill of complaint offers to convey the property to Raynett if the obstruction caused by his deed to defendants is removed. A better way, and one more sure to serve the ends of justice, is to declare both deeds void, and decree a conveyance from defendants directly to Raynett. From what appears in the record before us it is apparent that complainant, Raynett, is not a fit person to have the charge and management of his property. The statute has made provision for such cases;

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and it is to be hoped that the proper authorities will take appropriate measures for the appointment of a guardian (How. Stat. § 6314) that he may be taken care of in his declining years so far as his property will secure such care.

The decree of the court below will be affirmed, so far as it declares and decrees the deed from F. William and Mary E. Standall to defendants to be void, and so far as it declares the note and mortgage from defendant to Standall to be void; and it will be modified so as to declare the title to the premises described in the bill to be in Edward Raynett, and decreeing the deed from Edward Raynett and wife to F. William and Mary E. Standall, of the premises in question, to be null and void, and directing the defendants to convey to Edward Raynett, by deed duly executed and acknowledged, the premises described in the deed from Standall and wife to them. The bill of complaint must be dismissed as to complainants F. William and Mary E. Standall, with costs of solicitor's fees in both courts in favor of defendants, to be taxed; and the complainant Raynett to recover costs of both courts, to be taxed.

Let a decree be entered here in conformity to the above opinion.

The other Justices concurred.

WILLIAM ANDERSON v. L. DANA HILL.

Internal improvements—Improving channels—Taxation for local purposes—Titles of statutes—Unconstitutional appropriations.

1. Moneys raised by tax upon a township for a work of internal improvement, and to be applied thereto by a State Board, are not township moneys, even though the township treasurer is the officer designated by law to collect them; and the treasurer and not the township is liable for them if collected.

2. Act 323 of 1881 imposing a tax upon specified townships for the pur-

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pose of improving the channel of a stream is void, because it conflicts with the constitutional provision that the State shall not engage in any work of internal improvement unless by granting land therefor.

3. A statute entitled "An act to provide for the straightening or otherwise deepening the channel of the Dowagiac river, in Van Buren county" and providing for a tax to accomplish that purpose is unconstitutional because the title does not cover the provisions of the act; but this is so only because taxation for such a purpose is prohibited by the Constitution; otherwise the provisions for taxation would be covered as a necessary incident to the general object of the law.

4. A statute providing for the payment of money to accomplish a purpose which the payees have already agreed to perform for a sum fixed by an independent contract is unconstitutional because it is a grant of extra compensation, which is prohibited. Const. Art. iv. § 21.

5. Taxation for a local purpose cannot be sustained if the law authorizing it be unconstitutional, even though the tax be voted by a majority, for so far as the minority are concerned its enforcement deprives them of their property without due process of law.

Error to Van Buren. (Mills, J.) June 6.—Sept. 23.

ASSUMPSIT. Plaintiff brings error. Reversed.

Lester A. Tabor for appellant.

Jerome Coleman and *Dallas Boudeman* for appellee. A law appropriating money for the drainage of a swamp in order to preserve the public health is as valid as one to prevent the spread of contagion: Cooley on Taxation, 101; Cooley's Const. Lim. 533; *Woodruff v. Fisher* 17 Barb. 224; *Hartwell v. Armstrong* 19 Barb. 166; *Reeves v. Treas. of Wood County* 8 Ohio St. 344; *Sessions v. Crunkilton* 20 Ohio St. 349; *Anderson v. Kerns Draining Co.* 14 Ind. 199. See *Hager v. Supervisors* 47 Cal. 222; *People v. Whyler* 41 Cal. 351; *Thomas v. Leland* 24 Wend. 65; *Merrick v. Amherst* 12 Allen 500; *Gordon v. Cornes* 47 N. Y. 609; *Taylor v. Thompson* 42 Ill. 9.

CHAMPLIN, J. Pickerel Lake, in the township of Decatur, is substantially the head-waters of the north branch of the Dowagiac river, which flows from thence in a southwesterly direction across the township of Decatur, passing through the southeast corner of Hamilton township into Cass county.

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This stream is skirted the whole distance with low, marshy ground, from one-half mile to two miles and a half in width, through which the river runs with a sluggish current and in a zigzag course. There are four highways crossing the marsh in the township of Decatur, which are maintained at a considerable expense to the township. In the spring of the year the high water covers the marsh, and recedes in the dry weather of summer, exposing decomposed vegetable matter to the action of sun and wind, causing, in the opinion of several medical witnesses, a malaria which was productive of disease in the vicinity of the marsh.

In 1861 the Legislature of Michigan enacted that two hundred thousand acres of swamp lands of this State be appropriated, to be expended in draining and reclaiming said lands by means of levees and ditches, which land was placed under the direction of the Board of Control, and under their direction it might be appropriated at the minimum price fixed by law for said lands from time to time for that purpose, in such localities and under such rules and regulations as they might prescribe. How. Stat. § 5421. The law also provided that these improvements should be made under contracts which should be awarded to the lowest responsible bidder, who should give good security for the faithful performance of the work, and such contracts should not be let until thirty days' public notice had been given of the time and place of such letting, in some newspaper published in the county and at Lansing, and also by posting in the county, in at least twenty of the most public places.

On the 23d of February, 1882, a contract was entered into between Lyman T. Rawson, local commissioner upon the Dowagiac swamp-land State ditch, in behalf of the State of Michigan, and Alfred J. West, as principal, and Adrian D. Taylor and Thomas H. Bottomley, as sureties, for the construction of a ditch particularly described in said contract, a copy of which contract is as follows:

"This agreement, made the 23rd day of February, A. D. 1882, between Lyman T. Rawson, local commissioner upon the Dowagiac swamp-land State ditch, acting as such commis-

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sioner in behalf of the State of Michigan, pursuant to the statutes of said State authorizing and providing for the construction of said ditch, party of the first part, and Alfred J. West of Capac, in the county of St. Clair, State of Michigan, as principal, and Adrian D. Taylor of Romeo, in the county of Macomb, State of Michigan, and Thomas H. Bottomley of Capac, in the county of St. Clair, State of Michigan, as sureties, of the second part:

Witnesseth, that whereas, the said commissioner has given due notice (as required by the act entitled 'An Act to provide for the drainage and reclamation of swamp lands by means of State roads and ditches,' approved February 12th, 1859, being Act No. 117 of 1859, and the acts amendatory thereof) of the time and place of the letting of the contract for the work hereinafter specified: and at the time and place specified in such notice, the contract for such work was let by said commissioner to said principal, he being the lowest responsible bidder therefor:

Now, therefore, the said parties covenant and agree as follows, to wit:

The parties of the second part, in consideration of the compensation to be paid by the State of Michigan to the said principal, as hereinafter provided, covenant and agree that the said principal shall make, construct and finish, in a good, substantial and workmanlike manner, on or before the first day of December, A. D. 1882, a ditch between the following points, to wit:

Commencing at a point 2.71 chains east of the southeast corner of section (20) twenty, town (4) four south, of range (14) west, on the section line; thence running in a southwesterly direction to a point 28.40 chains west of the southeast corner of section (34) thirty-four, in town (4) four south, of range (15) fifteen west, on section line, being all of the Dowagiac swamp-land State ditch, according to the said commissioner's survey thereof, and being sections numbered 1, 2, 3, 4, 5 and 6, as shown by such survey; the entire length of said ditch to be constructed being 5 miles, 23 chains, 36 links, more or less.

The work of constructing said ditch shall be commenced by said principal at such point, and prosecuted on such sections, of two consecutive miles each, as the State swamp-land commissioner of said State shall direct. Said ditch to be seven feet wide at the bottom, with slope of sides one to one. The excavated earth to be removed two feet from the sides of said ditch, and depths according to the local commissioner's

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survey thereof, as approved by Board of Control. All the work aforesaid is to be well done, to the satisfaction and acceptance of the said local commissioner and of the State swamp-land commissioner of this State, and to be approved by the Board of Control of State swamp-lands. And the said party of the first part covenants and agrees that upon the full completion of the work aforesaid, at the time and in the manner above specified, and the acceptance thereof, he will officially certify such acceptance to the State swamp-land commissioner, and that, upon the certificate of said swamp-land commissioner that said work has been done in accordance with the terms hereof, and the approval of such certificate by a majority of said board, the said principal shall receive, as a compensation in full for said work and materials furnished, the sum of $4000, payable in State swamp-lands, which shall be selected by the said principal, his heirs or assigns, from any unsold swamp lands which may be in market in the Lower Peninsula of the State of Michigan, and applicable to the construction of said ditch, at the minimum price established by law at the time of such selection, and according to the provisions of the statute in such case made and provided, and the rules and regulations of the Commissioner of the State land-office, and patents shall be issued by the State for said lands, according to the laws applicable thereto.

Provided, that in every case twenty per cent. of the contract price shall be held in reserve on all acceptances which may be made from time to time, until the final completion and approval of all the work contemplated in this instrument. And the said parties of the second part agree to be bound by all the provisions of the act first above mentioned, and the acts amendatory thereof, and the act providing for the appointment of the State swamp-land commissioner, as well as by all of the conditions of this contract. The following, from section three of said first-named act, is also hereby made a part of this contract:

"The Governor, Secretary of State, Auditor General, State Treasurer, Attorney General, and Commissioner of the State Land-office shall constitute a Board of Control, and shall have power, and it shall be their duty, whenever, in their judgment, the public interest shall require it, to suspend the surveys and operations on any of said roads, or that of any roads to be hereafter constructed under the provisions of this act, and to direct re-surveys, with a view to the selection of more fit and convenient localities for the road; and to direct, from time to time, what work shall be commenced, suspended or

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discontinued; and to extend the time for completing the work on any contract, and to correct all errors in contracts, whether of description or otherwise, and to allow interest on the unpaid amount of any existing contract for the payment of money, from and after the completion and acceptance of the work stipulated to be done in said contract; and this provision shall be embodied in every contract under this act."

And the following section 14 of Act 177, Session Laws of 1871, is also made a part of this contract, viz.:

"Every contract approved by said State swamp-land commissioner shall contain a provision that no deficiency of swamp lands shall be so construed as to create any lien or establish any claim against the State, except as to lands above appropriated."

It is also understood that this contract is subject to the approval of the said State swamp-land commissioner, and shall only take effect upon such approval. And it is further agreed and stipulated that if the said Alfred J. West shall, from any cause, fail or neglect to complete and finish said ditch at the time and in the manner provided in this contract, that the said Board of Control shall have the right to declare this contract forfeited, and to direct the aforesaid commissioner to re-let the construction of said ditch to some other responsible party; and it is also understood between the parties hereto that *time* shall be considered and treated as of the essence of this contract; and in case of the failure to complete said ditch as aforesaid by the said first day of December, 1882, he, the said Alfred J. West, does hereby authorize the said Board of Control to cancel this contract, and also hereby relinquishes any right to compensation for work and labor and materials expended under the same. The stipulations and covenants herein contained shall apply to and bind the assignees of the said parties of the second part.

In witness whereof the said parties have hereto set their hands, the day and year first above written.

LYMAN T. RAWSON, [L. S.]
Local Commissioner.
ALFRED J. WEST, [L. S.]
ADRIAN D. TAYLOR, [L. S.]
THOMAS H. BOTTOMLEY, [L. S.]"

This contract was approved on March 1st, 1882, by Fred. J. Mack, State swamp-land commissioner, and was filed in his office on the 4th of March, 1882. The job was advertised,

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and there was but one bid given, and that was Mr. West's. In 1881 the Legislature passed the following act, namely:

An Act to provide for the straightening or otherwise deepening the channel of the Dowagiac river in Van Buren county.

Section 1. *The People of the State of Michigan enact,* That the legal voters of either or both of the townships of Decatur and Hamilton, in the county of Van Buren, are hereby authorized and empowered to vote a sum of money annually for three years from the passage of this act, at the annual township meetings for the election of township officers, by a special tax not exceeding one-half of one per cent. in any one year on the taxable property of such township voting, according to the equalized valuation thereof for the preceding year, for the purpose of straightening or otherwise deepening the channel of the Dowagiac river in said township.

Section 2. Notice shall be previously given of intention to move for such a vote and appropriation, signed by at least twelve freeholders of such township wherein the vote is proposed to be taken, and posted up in five public places therein, ten days previous to the day of such meeting, which said notice shall specify the amount proposed to be raised for such purpose: Provided, that no money shall be raised by tax unless a majority of the qualified electors voting at such meeting shall, by ballot, authorize the same.

Section 3. Said money, if voted, shall be assessed and collected in the same manner as other township taxes are, and expended in connection with other funds and means donated to and provided for such river improvement, after a full investigation of its merits, under the supervision of the State board of control of State swamp lands.

Approved March 17th, 1881. (Local Acts 1881, No. 323.)

It appears from the testimony of Lyman T. Rawson that he and Mr. Copley guaranteed to Mr. West that, if he would take the contract from the State, the people of the township should vote and raise $2500, which should be given to him in addition to the compensation which he should receive under his contract from the State; that there was nothing published to the effect that there should be $2500 donated to the man that took the contract when the proposal for bids was made.

On the 23d of March, 1882, which was more than three weeks

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after the contract had been entered into and approved notices signed by Lyman T. Rawson and A. B. Copley together with ten other freeholders of the township, were posted, as required by Act 323, of the intention of the signers to move the qualified electors of the township, at the annual meeting to be held on the 3d day of April, 1882, to grant and vote the sum of $2500, to be appropriated for the purpose of aiding the construction of the Dowagiac State ditch. At the election a vote was taken upon the proposition to raise $2500 by tax upon the township to aid in the construction of the State ditch, and it was carried by a majority of 179 votes—332 having voted *yes;* 122, *no;* and 21 not voting upon the question. The amount was duly certified to the supervisor and spread upon the tax-roll of 1882, and $90.04 was assessed against the real and personal estate of the plaintiff, liable to be assessed upon such roll. The defendant was township treasurer, and was duly authorized by his warrant to collect this tax. The plaintiff, under protest, paid the tax, under compulsion of legal process, to defendant. Afterwards he brought suit against the township to recover it back, but, before trial, voluntarily discontinued such suit. The defendant settled with the township board and accounted for this money in his hands as township treasurer. Afterwards he was re-elected to the office of township treasurer, and at the time of the commencement of this suit, he had the money collected from plaintiff in his hands.

The first question to be considered is whether, if any action can be maintained at all, it should have been brought against the township, and not against defendant. The circuit judge so held in the court below.

I do not see how the moneys raised under this act can be considered township moneys. They do not belong to the township, and the township authorities have no supervision or control over their expenditure. The same vote which determines to raise the moneys by tax, appropriates them to the purpose specified in the act; and they are to be expended under the supervision of the State Board of Control of State

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swamp lands. It is true, they are to be assessed and collected in the same manner as other township taxes are; but this does not make them township moneys. The State and county taxes are assessed and collected in the same manner as township taxes; but that does not make them township moneys. The language of the act merely directs the mode of assessing and collecting, and points out that the money so voted shall be assessed and collected in the same manner as other taxes in the township. The treasurer of the township is made the custodian of the money after he has collected it, until it is paid out or expended under the order and supervision of the State Board of Control of State swamp lands, simply because the law makes no other provision concerning it.

In this respect the case is quite parallel to that of moneys raised for drainage purposes, which it was held were not township moneys, and the township was not liable therefor. *Dawson v. Township of Aurelius* 49 Mich. 479; *Camp v. Township of Algansee* 50 Mich. 4. If, therefore, the defendant has received and holds the money of the plaintiff under circumstances which render it inequitable that he should keep it, there is no good reason why an action for money had and received will not lie to recover it back. Indeed, if this is not the case, then there appears to be no remedy at law to enable a plaintiff to recover money under circumstances such as here disclosed.

The plaintiff insists that Act No. 323 is unconstitutional; and if not, the tax is illegal because it was voted and raised for purposes and under circumstances that render it void as being against public policy. The alleged unconstitutionality of the act is based upon three grounds:

First. It violates sec. 20, art. iv, of the Constitution, which provides that "No law shall embrace more than one object, which shall be expressed in its title;" and the argument is that the title to this act has no connection whatever with any of its subsequent provisions. It nowhere informs the public that an appropriation is to be made. It expresses but a single idea,—that the State deems it necessary as one of its internal

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improvements to straighten or deepen the channel of the Dowagiac river; that neither the Legislature nor the public were informed that it contained provisions under which large sums of money were to be raised under the guise of a public tax on the people of a single township to aid the State in one of its internal improvements. The reply of defendant's counsel to this point is that "it is very evident that such improvement could not be made without money was raised in some way to pay for it, and the only mode of raising it is necessarily by a tax. The fact that nothing is said in the title of the act about the mode of raising the fund would not invalidate the act." That the straightening or otherwise deepening the channel of the Dowagiac river in Van Buren county expresses a work of internal improvement needs no argument. This is conceded by the counsel for defendant. He says: "The State could not, under the Constitution, engage in or aid in the proposed improvement except by a grant of lands;" and cites us to article xiv, § 9, of the Constitution. The State having the right to engage in and carry on works of internal improvement by the expenditure of grants to the State of lands, the obvious inference from the language of the title would be that the State proposed to provide for the straightening or deepening of the channel of the Dowagiac river by doing what they constitutionally could do, namely, by appropriating land for that purpose. This is the method she has provided for making her internal improvements since 1850. In view of the constitutional restriction, and the long course of practice pursued by the State in making internal improvements, would any one be justified in assuming that the language in the title of this act was intended to embrace the object of permitting the legal voters of the township of Decatur to vote a tax upon the taxable property of the township to aid the State in carrying on the work of straightening and deepening the channel of the Dowagiac river? Yet such was the real as well as the principal object of the act. Without this legislation, the State possessed full power, acting under its State Board of Control of swamp lands, to make the improvement named in the title of the act. The State has never

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acted, and has had no occasion to act, under the provisions of Act No. 323. The circuit judge, however, finds as a fact that the Dowagiac State ditch, mentioned in the contract above set out, was the same improvement as that contemplated by the special Act No. 323. If this be true, then clearly the object of the act was not expressed in its title, and could not be otherwise than in some manner indicating that the object of the law was to authorize or enable the townships of Decatur and Hamilton to aid the State in straightening or deepening the channel of the Dowagiac river in the county of Van Buren. As well might an act to authorize the construction of a railroad from one point to another include provisions for municipalities along its route to vote aid in its construction, without violating the Constitution.

Second. It is contended that this act violates article xiv, § 9, of the Constitution, which provides: "The State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property." It is not denied that the State had the right to make the improvement by the appropriation of swamp lands for that purpose, and that the contract with West was a competent contract for the State to make. But the vital question is, can the State engage in the work of this improvement and provide means for the payment thereof by direct taxation laid upon the whole or upon any part of the property in the State? If the Legislature has the authority to pass a law permitting the majority of the legal voters of a particular township to impose a tax to aid the State in the work of an internal improvement, it has the authority to impose such by direct enactment without the intermediate step of a vote of the people and against their wish. And the rule is well settled, if it has not the power to impose such tax directly, it cannot authorize the imposition of the tax indirectly through a vote of the municipality or people. If this act of the Legislature, instead of authorizing and empowering the legal voters of Decatur and Hamilton townships to vote the tax in question, had enacted that $2500 should be assessed and raised by

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taxation, and levied upon the taxable property of the township of Decatur, and paid over to the State to be expended under the supervision of the State Board of Control of the State swamp lands to aid in paying for the deepening and straightening of the channel of the Dowagiac river in Van Buren county, it is plain that it would have violated the provision of the Constitution above quoted. If the State Legislature has authority to impose a tax upon the township of Decatur to straighten or deepen the channel of the Dowagiac river, it has the same authority to impose a tax upon Ottawa, Kent and other counties through which the Grand river runs, to straighten or deepen the channel of that river. In short, it would have authority to engage the State in any scheme of internal improvement, and impose taxes to pay the expense thereof. It was to prevent such legislation that the clause above quoted was inserted in the Constitution. The early history of the State need not here be recurred to in order to show why such a clause was inserted in that instrument. Some of the reasons were briefly mentioned in *Bay City v. State Treasurer* 23 Mich. 499. Experience has demonstrated the wisdom of the policy adopted by the people when they framed the Constitution of 1850 and placed it beyond the power of the Legislature to engage the State in works of internal improvements, expect by the expenditure of grants of land or other property. This Court has, on several occasions, been called upon to apply this provision of the Constitution to legislation enacted in contravention of its terms.

In 1857 the Legislature passed an act entitled "An Act to provide for the improvement of navigation over the sand flats of the Muskegon river." Laws 1857, p. 394. This Act appropriated $50,000 from the proceeds of sales of internal improvement lands, which had been donated to the State for the purposes of internal improvements, and the money was to be drawn from the internal improvement fund and no other. The contract was let to John A. Brooks, and was completed by his assignee and accepted by the State, but the Auditor General refused to draw his warrant for the amount, for the reason that the internal improvement fund was exhausted.

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The Legislature, in 1867, passed another act, "to provide for the preservation of the Muskegon river improvement, and for other purposes." It authorized the levying and collection of tolls on the commerce of Muskegon river sufficient to pay $50,000, and interest thereon, in five years; and the question presented to this Court was whether this last statute conflicted with the above-mentioned provision of the Constitution, and it was held that it did. It was said in the decision of that case: "If the State, when it entered into the contract with Brooks, had stipulated that the contract price should be paid from tolls levied on commerce, or from any species of taxation, the unconstitutionality of the contract would have been too plain to admit of argument. The case would plainly be one where the State had engaged in a work of public improvement, to be paid for in some other mode than by the expenditure of grants to the State. But certainly the case is not varied in its legal aspects by the fact that the original contract provided for the payment in a constitutional mode, and the unconstitutional substitution is made afterwards. The Constitution does not permit the State either to contract a debt for a public improvement, or to expend in its construction anything but the grants which it has received for the purpose; and any legislation which attempts any other expenditure must be directly within the constitutional inhibition, and therefore void." *Ryerson v. Utley* 16 Mich. 274–75.

This case is decisive of the statute under consideration. The cases are parallel. In this case, the improvement of the Dowagiac river was undertaken by the State, under the law of 1859 and its amendments, and the contract, therefore, so far as appears upon its face, was legitimate and valid. But suppose the contract with West had contained a stipulation that $2500, in addition to the compensation he was to receive from the appropriation of swamp-lands, should be paid to him by a tax levied upon the taxable property of the township of Decatur, under the provisions of Act No. 323,—the illegality of the contract would have been apparent. The contract would have shown, upon its face, that the State had engaged in a work of public improvement, to be paid for in

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part in some other mode than the expenditure of grants of land to the State. The Constitution cannot be evaded by making a contract apparently valid, and by special enactment providing for a portion of the expenditure to be raised by taxation and expended in the work under the supervision of State agencies.

In the case of *People v. Township Board of Springwells* 25 Mich. 153, this constitutional provision was again considered, and it was said that "the question whether the work is carried on by the State in no way depends on the sources from which the money is drawn to pay for it. It is a State work, if directed, planned and executed by State agency; and while the fact that the money is charged on a certain locality may make the proceedings objectionable on independent grounds, it does not alter its character."

In the Springwells case, the improvement was to be paid for by special tax on property in a limited district, and no lands or proceeds of lands were to be used in the expenditure. The law was held void because it violated that provision of the Constitution which inhibits the State from engaging in works of internal improvement where the expenditure is not met by grants to the State of land or other property.

The statute under consideration employs State agencies to carry forward the improvement, and so far as the statute forms the basis of any action the means employed to further the improvement are raised, not from the proceeds of lands or other property granted to the State, but by taxation on a particular locality. The statute, for this reason, conflicts with the Constitution in this respect.

Third. Another objection to the legality of the tax is based upon the purpose for which it was imposed. The contract was entered into by Mr. West previous to the vote taken by which the tax was authorized. It describes fully the work to be done, and the time and manner of doing it, as well as the compensation which he was to receive. The law and the contract both provided that the contractor should have no claim against the State, except as to the lands appropriated, and Mr. West agreed that he would "make, con-

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struct and finish, in a good, substantial and workmanlike manner," the ditch therein described, in consideration of the compensation therein provided to be paid by the State of Michigan. This being so, the $2500 which was to be raised by taxation on the property owners of Decatur was a mere gratuity to Mr. West.

A law passed to authorize such a proceeding is unconstitutional. It deprives the citizen of his property without due process of law; and it makes no difference that it was assented to by a majority of legal voters. A person may give his own property to whom he pleases, but he cannot compel his neighbor to part with his property except by due process of law. *People v. Salem* 20 Mich. 452; *Bay City v. State Treasurer* 23 Mich. 499. I do not think the law can be sustained upon the theory advanced by counsel for defendant, that the taxation was for a local purpose and such purpose meritorious and beneficial to the public. It may be conceded that the straightening and deepening of the channel of the Dowagiac river would be conducive to the public health; that it would be advantageous to the roads leading across the swamp, and very much lessen the expense of keeping such highways in repair. Yet all this does not obviate the constitutional objections to the statute under which this tax was levied, and the remedy for existing evils must be sought in some other direction. The conclusions at which we have arrived with regard to the unconstitutionality of Act No. 323 renders it unnecessary to consider the question as to whether the transaction by which Mr. West was to be paid $2500 in addition to his contract price with the State, was void as being against public policy.

The judgment of the circuit court must be reversed, and a judgment entered here in favor of the plaintiff for $90.04, with costs of all the courts.

The other Justices concurred.

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WILLIAM WARNER v. HELEN WARNER.

Separation and desertion—Extreme cruelty.

1. Separation of married persons differs from desertion of one by the other; desertion, in Michigan, is willful abandonment for two years without cause and against the wish of the person abandoned, and it may even be charged upon the one who stays at home.
2. A wife who leaves her husband for cruelty which she reasonably believes makes further residence with him unsafe, is not chargeable with desertion; but *he* is.
3. It is extreme cruelty for a husband to call a sensitive and refined wife a bitch.
4. The Supreme Court will not disturb a decree dismissing a divorce bill unless fully convinced that if it had been in the place of the trial court it must have come to a different conclusion.

Appeal from Van Buren. (Mills, J.) June 10.—Sept. 23.

DIVORCE bill. Complainant appeals. Affirmed.

Annable & Fitch for complainant.

Lester A. Tabor for defendant.

SHERWOOD, J. The parties in this cause were married in February, 1878. They resided in Van Buren county, and had for many years prior thereto. The complainant was sixty-four years old, a widower, and lived upon his farm near the village of Lawton, with his daughter and an aged mother. The defendant was a widow, fifty-eight years of age, owned a house and several lots in Lawton, but resided in Paw Paw, and kept house there with a minor son nearly of age. The mother of complainant was about ninety years old, could scarcely get about upon crutches, was very gross and insulting in her language and conduct, and in consequence of a dislocated hip and other weaknesses and her restless disposition, required much attention and great patience and forbearance in caring for her. After their marriage the

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complainant took the defendant to her home upon his farm, he having taken her son into his service there several weeks before. The parties continued to reside together upon complainant's farm until about the 5th or 6th day of March, 1880, when they separated, the defendant leaving the complainant, who, on the 28th day of August, 1882, filed his bill against the defendant for divorce, alleging as the ground thereof that defendant had deserted him.

The defendant filed her answer to the complainant's bill, denying the desertion, or that she left the complainant without reasonable cause. She avers that the complainant is and was, when married, the owner of two good farms, one in the state of New York and the other in this State; that he represented his property to be worth $10,000; that he was amply able to support them in a respectable manner; that he would do so; and that her son should live with them until he chose to go for himself. And defendant further avers that, when she went to live with complainant, she took with her all her beds, bedding, table linen, and furniture, put the same into immediate use in the family of complainant, and continued so to use the same until much of it was worn out, which he refused to replace. She further claims, and the testimony tends strongly to show, that the complainant promised defendant that he would make repairs upon her house in Lawton, and after the first year would go and live there with her, which he subsequently refused to do. The answer further avers that the complainant refused to furnish defendant with suitable clothing and other necessaries; that during the four years of their marriage he let her have less than eleven dollars for that purpose; that very soon after their marriage complainant and his mother commenced to ill-treat the defendant and her son; drove the son away from their house; was in the habit of cursing and swearing at defendant, calling her vile and wicked names, and so cruelly treated her that he threatened her with personal injuries even to the taking of her life; that his abusive conduct was frequently exhibited towards her in the presence of her son and other persons; that she endured his cruelties and neglects for over

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two years, and until she found that they were greatly impairing her health, making her life a burden, and that there was no hope of reform, and then left the complainant; that, as she left him, with an oath he called her a bitch and told her to go. She further avers that while she lived with him she treated him kindly and in a manner becoming a good wife; that he never had any cause for his ill-treatment; that it was solely for the protection of her life and health that she left him; and that he has never since expressed a wish or desire that she should return and live with him.

The testimony was taken in open court, and is voluminous, both parties being sworn in the case. After a patient hearing and careful examination of the testimony, Judge Mills refused to grant a decree of divorce, and dismissed complainant's bill. We think he decided correctly. Separation is not necessarily desertion. The latter may not arise until long after the former has occurred. *Reed v. Reed* Wright 224; *Ahrenfeldt v. Ahrenfeldt* 1 Hoff. Ch. 47: *Clement v. Mattison* 3 Rich. (S. C.) 93; *Fellows v. Fellows* 31 Me. 342. And when separation and desertion occur at the same time, the guilty party is not always the one who leaves the matrimonial home. *St. John v. St. John* Wright 211; *Cossan v. Cossan* id. 147; 2 Dane's Abr. 308; Bish. Mar. & Div. § 514. Desertion, under the statute, is the willful abandonment of one party by the other without cause, and against the will of the party abandoned, for the period of two years. If the husband's conduct is so cruel towards his wife that she cannot live and cohabit with him with safety to her health or without peril to her life, or if she has good reason to believe she cannot, and for such reason she leaves him and abandons his home, she does not thereby commit the crime of desertion. In such case she does not leave her husband or her home in consequence of any willfulness on her part, but is compelled by the cruelty of her husband, and against her will, so to do. The desertion in such case is upon his part, and not upon hers. He as completely commits the crime of desertion when, by his cruel conversation and conduct, he compels her for safety to leave him and his home, as when he willfully

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and without cause leaves and abandons her. In all such cases the husband is guilty of the crime or misconduct he charges against the wife, and of course cannot have a decree. How. Stat. § 6232.

We have examined the testimony in this case with care, and find very many of the averments contained in the answer sustained by the proofs, particularly those relating to the cruel language and conduct of complainant towards his wife. His parsimoniousness is also quite apparent. The language used by complainant to defendant, so far as the record shows, appears to have been without cause or provocation—intolerable among decent people—and clearly, under the decisions of this Court, constituting extreme cruelty. *Whitmore v. Whitmore* 49 Mich. 417; *Palmer v. Palmer* 45 Mich. 150; *Briggs v. Briggs* 20 Mich. 34; *Bennett v. Bennett* 24 Mich. 482; *Goodman v. Goodman* 26 Mich. 417.

The defendant, as shown by the testimony, is a sensitive woman of good taste, culture and refinement. To her such language and treatment is the worst kind of cruelty. She endured it until it not only destroyed the comfort and happiness of her home, but threatened her health, and there was no hope of change. No rule of law or equity would compel her to remain longer with the complainant, and by leaving him she did not incur the penalty of giving her guilty husband cause for divorce. The circuit court evidently took this view of the case, and I fully agree with Chief Justice Graves in his remarks in the case of *Nicholas v. Nicholas* 50 Mich. 162, when he says the appellate tribunal ought to be fully persuaded that it must have reached a different conclusion had it occupied the position of the court appealed from and been favored with all the advantages of that court for judging rightly, before overruling the decree made.

We shall not attempt to give a synopsis of the testimony, nor is it necessary to comment further upon it in disposing of the case. We will say, however, that a review of the evidence and arguments of counsel has only confirmed our conviction of the justice of the decree rendered by the circuit judge, which must be affirmed, with costs, and in addi-

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tion thereto the complainant must pay to the defendant the sum of $500, within ninety days after the entry of the order therefor, as alimony pendente lite.

The other Justices concurred.

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Charles C. Bowen v. The Detroit City Railway Co.

Street Railways—Diligence in clearing tracks of snow.

1. A street railway company is bound to exercise such care and diligence in clearing its track of snow as not to interfere needlessly with the safety and convenience of persons lawfully using the street; and if an extraordinary snow-fall takes place it must make extraordinary efforts to dispose of it.

2. In an action for an injury caused by obstructions which in the first instance are lawfully in the street, but which defendant is bound to remove as speedily as possible, it is not necessary to allege that they were left there for an unreasonable time; the offense of leaving them there relates back so that it becomes unlawful from the beginning and the time necessary for their removal is matter of justification and defense.

Error to the Superior Court of Detroit. (Chipman, J.) June 12.—September 23.

Case. Defendant brings error. Affirmed.

Brennan & Donnelly and *Fred A. Baker* for appellant.

Otto Kirchner for appellee.

Champlin, J. The defendant is a corporation operating about eighteen miles of street railway in the city of Detroit. One of its lines is upon Woodward avenue, which consists of a double track. The ordinance under which it is permitted to run and operate its railway requires that it shall keep its track clear from snow. To do this expeditiously it uses Day's improved scraper, which is so constructed as to force

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the snow accumulating on its tracks to the side thereof to a distance of about six feet, and attached to the scraper or snow-plow, as it is sometimes called, is a lever extending beyond about four feet, which serves to level down the ridge of snow thrown out by the scraper. This lever is adjustable, and can be raised or lowered. It usually passes about twelve inches above the ground. In ordinary snow-storms this apparatus so disposes of the snow that no inconvenience is occasioned to the public travel.

On the night of February 2d, 1883, a severe snow-storm set in, and continued to fall until the night of the 3d. The snow was very damp, mixed with rain, and packed so firmly when removed by the snow-plow that the leveler failed to distribute it; and it was left in ridges on either side of the tracks, varying in height from two to three feet. On the 3d the weather turned cold, and by three or four o'clock it froze very hard, which had the effect to completely coat these ridges with ice. On Monday, the 5th, the defendant endeavored to level down these ridges by taking a large stick of timber loaded with iron, and hitching spans of horses to each end, and so break them down, but without success. It then took a large plow it had for grading streets, and that broke them up in such large lumps that it was more dangerous than to let them remain as they were, and nothing more was done to remove them. The plaintiff resided at No. 1095 Woodward avenue, and on the evening of the 6th of February, 1883, he was proceeding along Woodward avenue with his son in a sleigh, his team being driven by his coachman toward his home. There was not sufficient room for teams to pass each other between the ridge of snow above described and the curb-stone. On reaching a point opposite the residence of a Mr. Farrington, a grocery delivery wagon was standing in the passage-way between the ridge and the curb. To pass this wagon, the driver crossed over the ridge to the street-car tracks, and continued on in the rear of and following one of defendant's cars, until it stopped for some cause, and plaintiff's team passed around the car in the space which had been cleared of snow, and proceeded on until they were

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about to meet another car coming from the opposite direction, when, at the intersection of Warren with Woodward avenue, the driver again attempted to cross the ridge to the drive-way between it and the curb; and in crossing the ridge at this point the sleigh upset, the persons in it fell out and the horses ran away. The horses and sleigh were injured; and plaintiff brought this action to recover his damages, which he claims were occasioned by the act of defendant in creating these ridges of snow.

The declaration in the case does not allege that the act of the defendant was unlawful or even wrongful; nor does it aver any duty owing by defendant to the public or to plaintiff, nor negligence in the discharge of any duty. The defendant insists that removing the snow from its tracks in the manner shown by the testimony was a lawful act, and properly performed, and that the only possible ground upon which the defendant could be made liable would be because it did not remove the ridges within a reasonable time; and that there can be no recovery in this case under the declaration, because there is no averment that defendant neglected to remove the ridges of snow within a reasonable time. On the other hand, the plaintiff's contention is that the ridges constituted a nuisance in the public street, and that the defendant is liable for all damages sustained by the plaintiff in consequence of placing them there.

It may be considered as settled at the outset that these ridges of snow constituted serious and dangerous obstructions in the street, which interfered with the safety of the public travel and use of the streets, and unless authorized by law were per se nuisances. But if authorized by law they cannot be considered nuisances. Our attention has not been called to any statutory authority which expressly authorizes the defendant to cast the snow from its tracks into the adjacent street. The statute conferring authority upon street railway companies to incorporate and to use streets is embraced in How. Stat. ch. 95. They are authorized, with the consent of the corporate authorities of the city, under such rules, regulations and conditions as such corporate authorities may pre-

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scribe, to construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of the streets. In constructing the railway they are required to conform to the grade of the streets established by the corporate authorities, and to lay the track in such mode and with such kind of rail, and to keep the railway and that part of the street and pavement within and adjacent to the track in such condition and state of repair as prescribed and provided in the consent, grant or agreement of the municipal authorities permitting the construction of the railway. The corporate authorities are authorized to prescribe by ordinance or otherwise such rules and regulations in regard to the street railways as may be required for the grading, paving and repairing the street, and to prevent obstructions thereon. It is made a misdemeanor, punishable by a fine not exceeding five hundred dollars or imprisonment in the county jail not more than one year, for any person to willfully obstruct, break, injure or destroy any railway constructed or operated under that act, or any work, car or building belonging to or in possession of the street railway company. There is nothing in this legislation that grants expressly to defendant any rights in the public streets except for constructing, maintaining, owning and operating a street railway, and by implication such rights as are necessary to carry out the purposes of the grant, and no more of the street is granted than is necessary for that purpose. The franchises conferred are to be enjoyed in common with, and not in exclusion of, the public in the street for the uses and purposes of a highway. It is a matter of common notoriety that all railways must have a clear track in order to be operated at all, and that accumulations of ice and snow must of necessity be removed. And it may fairly be presumed that the Legislature intended that companies organized under the act should keep their track in condition to be operated for the accommodation of the public at all seasons of the year, and that the street adjacent to the track might be used as a place of deposit for the snow that accumulates at certain seasons, in such manner as should not interfere with the rights of the public in the use thereof as

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a public highway, or of private individuals as owners of adjoining property.

Although the Legislature by implication granted the right to defendant to deposit the snow from its tracks upon the sides of the street, the company, notwithstanding, were bound to exercise the right conferred in a manner consistent with the rights of the community in the use of such street, and it was also bound to exercise the highest degree of care to prevent injury to the persons and property of those affected by its acts. And while it is implied from the legislative grant to operate the railway that the snow may be deposited or thrown to the sides of the tracks, yet it will be observed that the method to be employed to accomplish the object of keeping the tracks clean is left with the company to determine; and where there are different methods which may be pursued by which the authority given may be exercised, by one of which the snow would be left in such a manner as to become a nuisance, and another not, that method must be adopted which will not create a nuisance. Every person having occasion to use the public streets for the purpose of travel or passage is entitled to feel that he is absolutely safe, while exercising ordinary care, against all accidents arising from obstructions in the street, and no one has the right, without special authority, to materially obstruct it or render its ordinary use dangerous. It is evident that the rights of the public and of the defendant may both be secured in the reasonable use of the streets at the same time, and the railway company be enabled to discharge its duty to the public who rely upon or choose to patronize it, and the traveling public be enabled to use the streets with safety.

It is the duty of the company in removing the snow from its tracks to adopt such a mode as will not create obstructions in the streets to the detriment or danger of the public in the ordinary use thereof. If it can deposit the snow in the streets upon the sides of its tracks in such manner as not to interfere with the use of the street as a public highway, there appears to be no good reason why it may not adopt that mode of disposition, but in doing so it can not be permitted to leave it in ridges or piles which would obstruct the streets, and make

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them unsafe or dangerous for vehicles to pass along or cross them. Its rights in this respect are subject and not paramount to the rights of the public to use the streets for the ordinary purpose of passage, and all acts which create obstructions to the use of the street by the public are unlawful. Was the manner adopted by the defendant to dispose of the snow a proper one? The testimony is that the means employed were the most expeditious and best adapted to the purpose of any known appliance, and the one in general use by street railway companies. It also appears from the testimony that ordinarily the snow was not left in ridges, but was leveled off and distributed so that it was not dangerous to the public in using the streets; but in this instance the snow was not leveled off, and remained in ridges, forming dangerous obstructions to travel. The defendant insists that this was not owing to any fault of defendant, but to the extraordinary nature of the storm, rendering it impossible for the machine to distribute the snow as it was forced from the track. If this was an extraordinary storm, the defendant was called upon to put forth extraordinary exertions, not only to clear its tracks but to see that in so doing it did not create an obstruction in the street which would interfere with the public use thereof; and if obstructions were unavoidably made by the mode it employed to clear its tracks of snow, it became its imperative duty to remove such obstructions within a reasonable time, and if it failed to perform this duty it must be held responsible for the consequence to any one in the exercise of ordinary care who has suffered an injury thereby.

The question of reasonable time, in the absence of controversy respecting the facts, or where they are conceded, is one of law for the court to determine, and is defined to be "so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires, in the particular case, should be done." In this case there was no controversy about the facts. The snow ceased to fall on the 3d, and the accident happened on the evening of the 6th. It is manifest that a reasonable time in which such ridges could and should have been reduced had elapsed before the accident happened. Nothing was done by the defendant until the 5th,

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when an effort was made to level the ridges with a stick of timber, which was unsuccessful. Next a plow was used, which did not work satisfactorily, and then the effort was abandoned. Considering the dangerous nature of the obstructions, the defendant was reprehensibly negligent, and showed an utter disregard of the public welfare. It cannot be doubted that other and more ordinary and effective means were at hand, and should have been resorted to. It is unnecessary to mention them. They readily suggest themselves to persons of usual intelligence. The defendant neither removed the obstructions nor excused its want of diligence in removing them, and is justly responsible for the consequences of placing them in the street.

The defense insisted upon, that the defendant is not liable for placing the obstructions in the street, but, if at all, for not removing them in a reasonable time, is rather technical. If it should be conceded that it was lawful for the defendant to create the obstruction in the first instance, yet if allowed to remain an unreasonable length of time, it became unlawful from the beginning, and in an action to recover for the injury caused by the obstruction it is proper for the plaintiff to base his right of action upon the obstruction as unlawful at the time of the injury, and it is not necessary to declare as for leaving it there an unreasonable time. It is matter of justification and defense. It is always a sufficient answer to say that the obstruction was in the highway only a reasonable time and for a lawful purpose. In coming to the conclusion they did, the jury must have found, under the charge of the court, that the plaintiff was in the exercise of ordinary care and did not contribute to the injury complained of, and that such injury was occasioned by the obstructions which defendant caused to be placed in the street and suffered to remain until the time of the accident. The charge of the court was substantially in accord with the views above expressed, and under the facts the plaintiff was entitled to recover, and

The judgment is affirmed.

Cooley, C. J., and Campbell, J. concurred.

Sherwood, J. concurred in the result.

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The County of Alcona v. Robert White et al.

County clerk—State road commissioners—Road taxes.

1. Certiorari to review an allowance against a county may be sued out by the clerk of the board of supervisors, and it is assumed that in doing so he has the authority of the board if it does not repudiate his action. And it is unimportant that he sues it out as county clerk.
2. Special commissioners, named by statute, to lay out State roads are not county officers though required, for purposes of record, to render an account of their proceedings to the board of supervisors.
3. Moneys raised by road-district taxes as a special fund established by legislation for the construction of State roads are not county moneys though placed in the county treasurer's hands for safe-keeping.

Certiorari to commissioners appointed to adjust rights between Alcona and Oscoda counties. Submitted June 12. Decided September 23.

W. E. DePew and *A. McDonell* for plaintiff in certiorari.

John L. Kittle and *Shepard & Lyon* for defendants in certiorari.

Cooley, C. J. This proceeding is instituted for the review on certiorari of the action of a special statutory board in apportioning the property and moneys of the old county of Alcona between the county of Alcona as it now exists and the county of Oscoda which has been set off from it. The only part of the action complained of is the allowance to the county of Oscoda of part of a certain sum of money supposed to be in the treasury of the county of Alcona and since the division to belong to the two jointly. The application for the writ of certiorari was made by the county clerk, professedly on behalf of the county; and it is objected on the part of respondents that the clerk has no authority to institute such a proceeding without the special direction of

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the board of supervisors, which the application does not show that he had in this case. But as the county clerk is also clerk of the board of supervisors, and there is no showing or suggestion that his action is repudiated by the board, we think it must be assumed that he is properly authorized, especially as the proceeding in itself seems to be entirely proper, and has for its object to inquire into the legality of an allowance with which the county for which he acts now stands charged.

The question on the merits is presented by the following state of facts:

By Act No. 404 of 1869 (3 Sess. L. 1127) a State road was directed to be laid out and established in the county of Alcona on a designated route, and all the non-resident highway taxes for five years collected in certain specified townships, were appropriated for the purposes of the road. John McCall was appointed commissioner for the laying out and construction of such road, and the moneys appropriated therefor were directed to be paid over to the county treasurer and by him to the commissioner. The commissioner was required to render periodical accounts of his proceedings to the supervisors of the county, and if a vacancy should occur in his office the Governor was empowered to fill it. By Act 394 of 1873 (3 Sess. L. 186) the road so to be laid out was extended, and a further appropriation of highway taxes was made for it. By Act No. 438 of 1871 (3 Sess. L. 183) provision was made for another road in Alcona county, of which A. F. Gay was to be commissioner, and there was a like appropriation of highway taxes, which were to be disposed of in the same way as under the act first named. These roads are now partly in the county of Oscoda, and the taxes appropriated to them have been in part collected in that county.

When the county of Oscoda was set off from Alcona there should have been in the hands of the county treasurer of Alcona a considerable sum of money collected for these two roads. It is said there has been a defalcation in the office of county treasurer of that county, and that the money is not

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on hand; but for the purposes of this case we shall assume that the defalcation is an immaterial fact. The question, then, is, whether, assuming the moneys to be now in the hands of the county treasurer, the county of Oscoda is entitled to a proportion of the sum.

If the moneys appropriated to these roads belonged to the county of Alcona while held by its treasurer, the claim of Oscoda county to its proportion of them was perfectly just and legal. But the most cursory examination of the acts referred to must be convincing that these moneys never belonged to the county, and never went into the hands of its treasurer as its property. They were received for taxes levied in road districts, and the legislation made them special funds for the construction of these roads. The funds were to be held by the county treasurer, but the county never had any proprietary interest in them, and could not have made use of them for any purpose. They were held by the county treasurer as special custodian for an officer appointed by the State, and who was in no sense a county officer. The account of his proceedings was required to be rendered to the board of supervisors for the purposes of a suitable and convenient record only, and not because either the commissioner or the fund was under county control.

The cases of *Dawson v. Aurelius* 49 Mich. 479 and *Marquette v. Ishpeming Treasurer* 49 Mich. 244 presented similar questions, and are authority for the conclusion above stated. An error was committed in awarding to Oscoda county a portion of these funds, and to that extent the allowance must be vacated. The amount is $8549.57.

The other Justices concurred.

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Wm. D. Robinson and Wm. C. House v. Thomas Walsh.

Fraud—General verdict—Fraudulent Chattel Mortgage.

1. In trover for goods which plaintiff had sold in reliance on false representations, and defendant had seized upon a chattel mortgage given him for the purpose of defrauding plaintiff, a general verdict in plaintiff's favor covers the questions of defendant's participation in or knowledge of the fraud, if those questions were submitted to the jury.
2. It is too late to object for the first time in the appellate court, that the jury had taken to their room a memorandum made by counsel.
3. A chattel mortgage is invalid if instead of being taken as security it was taken to prevent the vendor of the mortgaged goods from recovering them or their value.

Error to the Superior Court of Detroit. (Chipman, J.) June 12.—September 23.

Trover. Defendant brings error. Affirmed.

Henry C. Wisner for appellant.

Levi T. Griffin (*Griffin & Warner*) for appellees. One who claims title under a fraudulent vendee must show that he is a bona fide purchaser: *Devoe v. Brandt* 53 N. Y. 462; and to constitute a bona fide purchaser there must be a parting with money or property or the doing of some act upon the faith of the purchase itself which could not be retracted, such as executing a release for a pre-existing debt: *Rollins v. Callender* 1 Freem. Ch. 295; *McLeod v. First National Bank* 42 Miss. 112; *Root v. French* 13 Wend. 570; *Lynch v. Beecher* 38 Conn. 490; *Downs v. Belden* 46 Vt. 674; *Williamson v. N. J. R. R. Co.* 29 N. J. Eq. 311; *George v. Kimball* 24 Pick. 234; *Rison v. Knapp* 1 Dillon 186; *Nicol v. Crittenden* 55 Ga. 497; *Boxheimer v. Gunn* 24 Mich. 372; *Stone v. Welling* 14 Mich. 514; *Thomas v. Stone* Walk. Ch. 117; *Dixon v. Hill* 5 Mich. 404; *Warner v. Whittaker* 6 Mich. 133; *Blanchard v. Tyler* 12 Mich. 339; *Chadwick v. Broadwell* 27 Mich. 6; *Kohl v. Lynn* 34 Mich. 360; *Johnson v. Peck* 1 Woodb. & Minot 334; *Morse v. Godfrey* 3 Story 364; *Tiffany v. Warren* 37 Barb. 571.

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SHERWOOD, J. The action in this case is trover to recover the value of a quantity of goods consisting of a stock of boots and shoes. The plaintiffs, who did business in Detroit, in the month of August, 1882, made a sale of goods, amounting to about $1000, to King & Co., who had stores and did business at Grand Rapids and Big Rapids. At the time of this purchase the defendants owed plaintiffs about $112. The defendants continued to buy goods of plaintiffs through August and September and October following, and made payments thereon. On October 17th and November 9th the defendants made purchases of plaintiffs aggregating about $2300, and made some payments on their account as before. The plaintiffs claim that August 11th, when the $1000 purchase was made, King & Co. made representations as to their financial condition, which induced the plaintiffs to make the sales to defendants of October 17th and November 9th.

The firm of King & Co. was composed of Daniel Walsh and Joseph Walsh, a brother of defendant. The defendant was a member of the firm of Thomas Walsh & Co., and did business in Detroit. This company was composed of Thomas Walsh and William H. Jennings, the latter being a special partner. The plaintiffs and Thomas Walsh & Co. had for a number of years been engaged in the wholesale auction business, dealing in boots and shoes, and were competing firms in that trade in the city of Detroit. King & Co. were engaged in the same business, and had been a customer of both the other firms in Detroit a number of years, and had running accounts with each up to the time the present controversy arose.

The plaintiffs claim that on August 11, 1882, King & Co. made representations upon which plaintiffs relied, and which induced them to make the sales of October 29th and November 17th, above mentioned. The representations, as testified to by plaintiff Robinson, were as follows: After taking the order of King & Co. for goods, he says:

"I sent for Daniel Walsh; we had taken his order for a bill of goods, and I asked him the amount of his indebtedness. He said he owed to Ellis & Butman, of Chicago,

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about $600; he owed us between $100 and $200. He said that would cover all his indebtedness for merchandise, or for anything else. I asked him directly whether he owed anything to Thomas Walsh & Co. (I was speaking about King & Co), and he said no; they did not owe him a dollar. This was on August 11, 1882. That they had not bought any goods of him in some time, for the reason that Thomas Walsh & Co. did not carry the line of goods that their trade required. He said he did not owe him anything for borrowed money; did not owe him anything at all. He said the stock in the store was between $4000 and $5000; that they had an insurance of $2000; that they had a note made by Muffley for $1600. I asked him who the firm was composed of. He said it was J. King, and he did not care to disclose who the other member of the firm was. He stated further on that his former debts had never been settled, and he couldn't own anything in his own name, and therefore a brother of his in Canada owned it for him."

The plaintiffs claim that so far as King & Co.'s not being indebted to Thomas Walsh & Co., the representations were false.

On the 20th of November, 1882, Thomas Walsh & Co. held three notes; the first, dated August 29, 1882, for $2165.64; the second, dated September 18, 1882, for $1995.44; and the third, dated October 30th, for $4208; and on the said 22d day of November, for this aggregate of indebtedness, divided in two parts, King & Co. executed two mortgages to the defendant to secure their payment to Thomas Walsh & Co.; one for $5500, on the Grand Rapids stock, and the other for $2869.31, on the stock at Big Rapids, with interest, due December 5th following. The first two notes defendant claimed had been given in renewal of other paper by King & Co., and for amounts due on account; and the third was given for goods purchased by King & Co. from defendant, October 17, 1882. When the mortgage became due defendant took possession of the goods, and by virtue thereof made sale of the same. While he thus had possession, the plaintiffs pursued the goods sold to King & Co., and found $1452.75 worth in the possession of the defendant, made demand for them of defendant, which was

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refused, and then brought this suit, claiming that the purchase by King & Co. was fraudulent, and that the defendant was a party to the scheme of fraud by which King & Co. obtained them.

A trial was had in the Superior Court in Detroit before a jury, who returned a general verdict for the plaintiffs for $1503.52. They also found specially, in answer to questions submitted to them by the court: (1) That Robinson made the sales of October 17th and November 9th to King & Co., relying upon the statement of Daniel Walsh, on August 11th, that King & Co. did not owe Thomas Walsh & Co. at that time; (2) that Robinson would not have made those sales if Daniel Walsh had not made the statement that King & Co. were not then indebted to Thomas Walsh & Co.; (3) that Robinson made those sales relying solely upon the statements made; (4) that there is no evidence that King & Co. owed anybody except the balance due Robinson of $125 and $800, as stated by Daniel Walsh on the 11th of August, if they did not owe Thomas Walsh; (5) that King & Co. were indebted to Thomas Walsh, as shown in the account on defendant's books, $4000 and over.

It was claimed by plaintiff's counsel that the goods on the last two purchases were procured by fraud, and that Thomas Walsh participated in it from the beginning, and testimony was given and circumstances disclosed, the tendency of which was to show that fact. That question was submitted to the jury by the court in his charge, and the general verdict is against the defendant, which covers that point. And even though the indebtedness from King & Co. to Thomas Walsh existed, it is claimed that from all the facts and circumstances appearing in the case, he knew of the fraudulent manner in which the goods were obtained from plaintiffs, participated in the schemes to obtain them, and defraud the plaintiffs out of their pay, and that the mortgages were issued for that purpose, and not to secure the payment of the indebtedness claimed by defendant. The general verdict covers this part also, as the whole question of fraud in all its phases, as claimed, went to the jury. Their finding is conclusive upon

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the subject, unless error was committed in the charge or the rulings of the court in taking the testimony.

A careful examination of the record and assignments of error have failed to disclose to us any rulings on the admission of the testimony not within the previous decisions of this Court. The discretion allowed the trial judge in this class of cases seems not to have been exceeded or abused, and we do not feel at liberty to disturb the verdict on account of any exceptions taken to the judge's charge, or his refusals to charge, appearing in the errors assigned.

It is unnecessary to consider each exception separately, but suffice it to say that most of defendant's requests to charge were given in substance, and those rejected were properly refused. There was testimony of some sort tending to prove or disprove every fact submitted to the jury by the court in those portions of his charge to which exception is taken. There was no objection made to the jury's taking the memorandum submitted by plaintiffs' counsel to their room when it was submitted. The objection in this Court comes too late to avail the defendant.

There was no error in the court's refusal to give the plaintiffs' seventh request, upon which counsel for defendant specially relied. The request is as follows: "Independently of every other question in the case, if the jury find that King & Co. were indebted to Thomas Walsh & Co., as stated in the chattel mortgage, your verdict must be for the defendant." As we have already said, if the mortgage was made and not intended for security, but to prevent the plaintiffs from recovering the property or its value, obtained upon a fraudulent sale, it would be of no validity, and the verdict given would be right.

The judgment of the Superior Court in this case must be Affirmed with costs.

The other Justices concurred.

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EDWIN HAFF v. ASENATH HAFF, LORENZO D. HAFF AND ALMON D. JENNEY. 54 511 64 301

ASENATH HAFF AND LORENZO D. HAFF v. ALMON D. JENNEY. 54 511 121 310

Laches.

Eleven years unexcused delay in filing a bill to set aside a deed or mortgage is such laches, even among near kinsmen, as will defeat the bill if meanwhile important evidence has been lost by it.

Appeal from Macomb. (Stevens, J.) June 13.—Sept. 23.

BILL to set aside deeds and clear title. CROSS-BILL to set aside mortgage. Almon D. Jenney appeals. Reversed.

A. L. Canfield and *Baldwin & Draper* for complainant.

James B. Eldredge for defendant.

COOLEY, C. J. The purpose of the original bill in this cause was to set aside as void a deed of forty acres of land in Sterling, Macomb county, made by complainant and his wife to defendant Jenney, in November, 1849; and also another deed of the same lands, given by defendant Jenney to Asenath Haff and Lorenzo D. Haff in February, 1868, and a mortgage of the same date given by the grantees to Jenney for the sum of fourteen hundred dollars, and to restrain Jenney from further proceeding with a foreclosure of the mortgage. The leading facts in the case are the following:

Asenath Haff is the wife of complainant, and Lorenzo D. Haff his son. Defendant Jenney is his brother-in-law, having married his sister. Mrs. Haff and Lorenzo by their answer to the original bill admit complainant's equities, and the cross-bill is filed by them to have the mortgage and the accompanying notes given by them to Jenney set aside. The mortgage in addition to the forty acres covered another parcel of eighty-one acres the legal title to which was in Asenath Haff.

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The title to the land in question and also to another eighty acres in the township of Troy, Oakland county, was derived by a deed to complainant from his father Jacob Haff, made in 1845. Jacob, at the time of conveying the lands to him, was considerably indebted to one Page, and it was necessary this indebtedness should be paid off. It is alleged in the bill that in the summer of 1849 complainant became insane. Jenney denies this, and much testimony was taken upon this issue. In November of that year complainant deeded the forty acres in question, and also the eighty acres in Troy, to Jenney—as he says and as his testimony tends to show—without consideration and only because of the disordered condition of his mind. Jenney sold the Troy eighty to obtain the means of paying off the Page debt, and the proceeds were made use of for that purpose by consent of all concerned. Jenney claims that the conveyance to him of the forty acres was upon full consideration, and that the arrangement was made at the solicitation of complainant's wife and parents.

In 1866 complainant removed from the lot in controversy a barn he had built upon it, and Jenney brought suit at law against him for doing so. Complainant thereupon filed a bill in equity to set aside his deed of this lot to Jenney and to restrain the action at law, alleging that the deed was made when he was incompetent. Issue was joined in the chancery suit and some testimony taken, when in 1868 complainant's wife and his son Lorenzo, without the knowledge of complainant, went to Jenney and made an arrangement whereby the lot in question was deeded to them, and they gave back the mortgage of fourteen hundred dollars, now in controversy. This it was agreed was to be in settlement of the litigation. Mrs. Haff claims that she was not aware at the time that the mortgage covered her own lands, and says she did not agree that it should, and both she and Lorenzo insist that the arrangement was brought about by the arts of Jenney and was fraudulent. Complainant says that the whole transaction was a fraud upon him. Though ignorant of it at the time, he seems to have become aware of the facts in a short time, and

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called upon his wife for the deed, and received it from her. Jenney took a decree of dismissal of the chancery suit in 1869. Early in 1880 he began foreclosure of the mortgage under the power of sale, and the original bill in this case was then filed.

Upon this statement of the facts the objection which most naturally is suggested to the relief prayed is the long delay in making complaint. Twelve years had elapsed from the time the transaction complained of took place before the bill was filed to set it aside, and eleven years from the time decree was entered dismissing the former suit, which was based on the same alleged equities. Meantime, as is shown by the record, a number of persons who must have had knowledge of important facts have been taken away by death, and the presentation of facts in evidence must necessarily be defective. The delay is not explained, and not excused. It is not pretended that Edwin Haff has been continuously of unsound mind, or that the wife and son who gave the mortgage have at any time been under disability. It is suggested in one of the briefs for complainant that the relationship of the parties sufficiently accounts for the delay, or at least may tend to excuse it. No doubt the relationship is a fact to be considered, and it might well be accepted as an excuse for some delay, not only because of the natural repugnance to making a charge of fraud against a near relative, but also because it might with some reason be hoped that such a fraud would on reflection be abandoned and the fruits of it not claimed. But the delay in this case has been quite beyond what can be excused on any such grounds as these. Jenney, so far as we are informed, has never failed to claim the benefits of the arrangement made in 1868, and the parties now complaining have, for a period longer than that prescribed by statute for barring suit upon any personal demand, abstained from making any effective protest. One could never feel a safe reliance in his conveyances if after such a lapse of time they could be suffered to be attacked on a stale claim of fraud. The suggestion in the brief that the complainant rather than the defendant has been injured by the

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delay through the death of witnesses, is a begging of the question. We cannot know this: we can only know that there has been delay until of necessity the facts have become obscure or the proof of them lost; but whether this would tend to the prejudice of one party rather than the other is matter of conjecture merely. It is sufficient to justify a denial of relief that the moving party is responsible for the delay.

The cases of *Campau v. Van Dyke* 15 Mich. 371, and *Compo v. Jackson Iron Co.* 50 Mich. 578, and other cases cited therein, p. 595, are decisive against this bill, and also against the cross-bill.

The decrees must be reversed and both bills dismissed.

The other Justices concurred.

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David Davis v. Henry Burgess.

Breach of the peace.

1. Where a case is left to the jury on the question of damages only the verdict must stand unless a sufficient justification appears from defendant's showing.
2. The use of grossly indecent, profane and abusive language towards another person upon the public street and in the presence of others is a breach of the peace.
3. A peace-officer may arrest for a breach of the peace committed against himself as well as for those committed against others.

Error to Wayne. (Jennison, J.) June 17.—Sept. 23.

Case. Defendant brings error. Reversed.

Edwin F. Conely, *Henry A. Chaney* and *Wm. A. Moore* (*Moore & Canfield*) for appellant, cited as to the definition of a breach of the peace, *Com. v. Jeandell* 2 Grant 506; *Com. v. Teamann* 1 Phil. 460; *Com. v. Foley* 99 Mass. 497: Desty's Amer. Crim. Law § 91 *a*; *Cohen v. Huskisson* 2 M. &

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W. 482; *Webster v. Watts* 11 Q. B. 311; *Howell v. Jackson* 6 C. & P. 723; public profanity is indictable at common law: *People v. Ruggles* 8 Johns. 290; *State v. Jones* 9 Ired. 38; *State v. Chandler* 2 Har. (Del.) 553; *Updegraph v. Com.* 11 S. & R. 394; *State v. Kirby* 1 Murphy 254; *Com. v. Kneeland* 20 Pick. 206; *State v. Ellar* 1 Dev. 267; *Bell v. State* 1 Swan 42; *Holcomb v. Cornish* 8 Conn. 375; *Com. v. Hardy* 1 Ashm. 410; *Odell v. Garnett* 4 Blackf. 549; as to the power to arrest without warrant for the violation of municipal ordinances against profanity: *State v. Freeman* 86 N. C. 683.

Thos. R. Crisup and *Wm. B. Jackson* for appellee.

SHERWOOD, J. This is an action of trespass for assault and battery and false imprisonment. The plaintiff was a private citizen, and the defendant, at the time of the arrest complained of, was a policeman in the city of Detroit. On the 31st of August, 1882, the defendant claims he went into a pawnbroker's shop in Detroit to assist a young man in obtaining a watch he had left in pawn there; he saw the plaintiff, who was acting as clerk for the pawnbroker, Mr. Van Baalen, at the time, and Davis ordered him out of the shop, using profane and indecent language towards him as he left. The next day, about noon, Davis found Burgess upon the street, and told him there was a gentleman at the pawnbroker's shop who wished to see him. Burgess went there in company with another officer, and while there Davis asked Burgess for his name and his number, which was given, and thereupon Davis called the defendant almost everything indecent, saying he would have his buttons off of him, etc., and would make complaint against him. Davis' language was very indecent and profane. This was while they were in the shop. Defendant did nothing but walked out of the shop and across the street, and then started for a street car. Davis followed him, continuing his profanity and abuse, calling the defendant a son of a bitch, and other mean names, and by so doing gathered a crowd around them upon the street, and then he went into his store. Defendant told him that such language should not be used upon the public street, and was

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about to enter the car when Davis again came upon the street, and standing upon the sidewalk, renewed his vile and profane attack upon defendant, who was then going across the street, hailed him and again assailed him with vulgar, profane and indecent language in the presence of citizens, among whom were ladies, passing along the street. Burgess went to the plaintiff and asked him for his name, which he refused to give saying to defendant, "If you lay your hand upon me I'll shoot you," calling him at the same time a vile name. Defendant thereupon arrested the plaintiff, took him to the city attorney's office and made complaint against him under the city ordinance, which provides that "no person shall be guilty of using indecent or immoral language, nor be guilty of any indecent or immoral conduct or behavior on any public street, lane, alley, square, park or space in said city," the penalty being fine or imprisonment. The city attorney took the complaint but for some reason failed to prosecute it. Davis was discharged. This is the defendant's statement of the facts, and he claims that if found true by the jury they constitute a perfect defense to the plaintiff's action.

The defendant was sworn in his own behalf, and upon most of the material facts stated by him he was contradicted by the plaintiff, whose version of the matter presents an entirely different case; but with this we have little to do.

The court having charged the jury, in substance, that the only question for them to consider was that of damages, it is only needful for us to review the case as presented on the part of the defendant, and if, from his showing, he was not justified, the verdict must stand.

There seems to be no question that the official position of the defendant in the city of Detroit, at the time the arrest was made, constituted him a conservator of the peace. The arrest was made without warrant. At the time it was made (mid-day) the plaintiff was on the sidewalk, where citizens, men and women, were constantly passing and repassing, and there, in a loud, boisterous manner, he called the defendant a "God damned son of a bitch," and continued to use other indecent language. When defendant asked for his name he

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refused to give it to the officer, and threatened to kill him if he laid his hands on him. Only a few minutes before, the plaintiff had used the same and other profane language towards the defendant in the presence of a crowd upon the street.

There is no question about the officer's right to arrest for a breach of the peace committed in his presence without process. Did the language and conduct of the plaintiff on that occasion amount to a breach of the peace? The answer to this question must necessarily determine the decision in this case. The offense, whatever its character, was committed in the presence of the officers in the public street in a city, in the presence of citizens. The language used was not only vile and profane, but forbidden under penalties both by the by-laws of the city and the statutes of our State. It was against decency and public morals, of the most aggravating character, well calculated to arouse the passions and induce personal violence which was threatened if the officer laid hands upon the offender.

Now, what is understood by "a breach of the peace?" By "peace," as used in the law in this connection, is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in political society, and any intentional violation of that right is "a breach of the peace." It is the offense of disturbing the public peace, or a violation of public order or public decorum. Actual personal violence is not an essential element in the offense. If it were, communities might be kept in a constant state of turmoil, fear and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens but of public morals, without the commission of the offense. The good sense and morality of the law forbid such a construction. I think the language and conduct of Davis in this case, as it appears on the record, shows him guilty of a breach of the peace, and in the act of committing it at the time he was arrested. The court should have submitted the defendant's case, as he made it, to the jury under proper instructions, to ascertain the truth of the facts as stated

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by him and his witnesses. This the court did not do, and the failure was error.

The case of *Quinn v. Heisel* 40 Mich. 576, cited by counsel for plaintiff, is not in point. In that case the officer who was sued for making the arrest, as the plaintiff's testimony tended to show, made it after the offense had occurred, and the testimony was submitted to the jury under a proper charge, who found for the plaintiff. Neither do I see anything in *Sarah Way's Case* 41 Mich. 299, necessarily conflicting with the views here expressed.

It can make no difference that the officer was made the subject of the offender's wrong acts and conduct on the occasion. Officers are entitled to the same protection as other persons. It was the offense against the public which the people could punish, and the officer only acted for them in making the arrest. He had no personal interest in the matter. If the people failed to prosecute further, it was not the officer's fault; and if the plaintiff was guilty of the offense for which he was arrested, he cannot have suffered from the failure to prosecute. I think the judgment at the circuit should be Reversed, and a new trial granted.

COOLEY, C. J. and CHAMPLIN, J. concurred.

CAMPBELL, J. I am not satisfied that the case was not properly presented to the jury.

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ALEXANDER MICHIE v. PETER ELLAIR.

Injunction against ejectment suit—Notice by occupancy

1. A man agreed with his son that the son should have a certain piece of property by way of advancement from his estate, and the son took possession of it accordingly. The father executed a deed with the avowed purpose of delivering it to the son, but it was lost. The father however referred to the advancement in his will and so recognized it. Ejectment was brought for this land by one who, without

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consideration, had obtained from another of the testator's children a deed of whatever interest the latter had in the land. *Held*, that the son who had occupied and improved it could maintain a bill to enjoin the action, and to clear and confirm his title. His possession and continued occupancy were sufficient notice of his claim, and his case was barred neither by the Statute of Limitations nor by laches.

2. A decree in chancery will not be disturbed for errors in the admission of evidence if there was enough, aside from the testimony complained of, to support the findings on which the decree is based.

3. Record evidence of title is not absolutely necessary in a court of chancery, to sustain a bill to enjoin a proceeding in ejectment.

Appeal from Wayne. (Jennison, J.) June 17.—Sept. 23.

BILL to clear title, etc. Defendant appeals. Affirmed.

Geo. H. Prentis and *Alfred Russell* for complainant.

Edward E. Kane and *John Atkinson* for defendant, cited, as analogous, *Forward v. Armstead* 12 Ala. 124; *Evans v. Pattle* 19 Ala. 398; *Pool v. Pinckard* 23 Ala. 649; *Shepherd v. Shepherd* 1 Md. Ch. 246; *Ham v. Goodrich* 33 N. H. 32; *McClure v. McClure* 1 Penn. St. 378; *Jones v. Tyler* 6 Mich. 368; *Wright v. Wright* 31 Mich. 380; *Van Wert v. Chidester* 31 Mich. 209; *Ritson v. Dodge* 33 Mich. 463; *Peckham v. Balch* 49 Mich. 181; *Dragoo v. Dragoo* 50 Mich. 577.

SHERWOOD, J. The defendant in this case brought ejectment against the plaintiff to recover one-quarter of a farm at Grosse Pointe, consisting of about one hundred and forty acres. This suit is brought to enjoin the further prosecution of that action and to remove the cloud from complainant's title to the farm, created by the conveyance under which the defendant claims, and to confirm the complainant's title to the farm. The case was heard in the Wayne circuit court before Judge Jennison, on pleadings and proofs, and a decree made in accordance with the prayer of complainant's bill. The complainant asks for a reversal of that decree. I think the decree was right, and should not be reversed.

The complainant claims that his father, who lived and died in London, England, purchased the farm in 1836 for the sum of $2784, and in 1844 promised and agreed with complain-

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ant that if he would come to this State and go and live upon the farm he would deed it to him, and it should be regarded as an advancement to him for $3500; and the complainant, being then twenty-four years of age, accepted the gift upon the terms stated, came to Michigan, went into possession of the property, and has lived and uninterruptedly occupied the same under the agreement as his own farm, and improved and paid the taxes thereon ever since; that his father died in 1852 and his mother in 1860; that his father and mother, soon after the complainant came upon the property and married, made and executed a proper deed of conveyance to complainant, with the avowed purpose of delivering it to him, but in some way it became lost or destroyed before it was delivered or placed upon record, but that, in the will made by the father, he referred to the advancement made to the complainant at the sum of $3500, and thereby recognized the gift and agreement with the complainant, deceased having made no other advancement to him; that at the time of his death the father left three children, besides complainant, all of whom understood that complainant claimed the property as his and regarded him as the owner, and so understanding, two of them after the death of the mother, to perfect the record of title in complainant, quitclaimed their interest to him without any other consideration. The third, having married the defendant, refused to do so, but caused her interest to be conveyed to the defendant, who, after his wife obtained a divorce from him, brings this ejectment suit.

Complainant further claims that the defendant understood and was told by Mrs. Ellair at the time he obtained his deed from her that she had no interest in the property; that it was her brother's, the complainant's, and that he gave his wife nothing for the conveyance to him under which he claims. The circuit judge found from the evidence substantially the above-mentioned facts; and further found that the defendant has neither the legal nor equitable title to the undivided one-fourth of the complainant's farm, and that the conveyance which he then obtained thereto from Mrs. Ellair are clouds upon his title, and worthless; that the complainant has good title in fee to his farm, and that the clouds should be removed. I

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think the judge's findings are well supported by the law as well as the evidence in the case. The testimony is mostly that given by the complainant and Mrs. Ellair, and from letters written to the complainant by his father.

Objection is made to some portions of the complainant's testimony as being equally within the knowledge of the deceased father, and in several instances the objection is well taken. But aside from this, there is sufficient to support the findings of the circuit judge in the decree appealed from. It is insisted by counsel for the defendant that the rights relied upon in this case by complainant are barred by the Statute of Limitations. In this view I do not agree with counsel. The complainant's possession and occupancy of the premises, as shown by the testimony in the case, can only be fairly and reasonably accounted for upon the right and claims he makes. Neither was there any such omission on his part in perfecting the right he claims as the law deems laches. His taking possession and continual actual occupancy were sufficient notice to the world of his interest, and the extent of it, in the property. No question of priority of record is involved in the case, and it is of no consequence that the complainant failed to produce conveyance or record evidence of his title. In no case can such evidence be necessary to maintain his title, and it only becomes convenient when placed on the defensive, as in this case. That he is not in possession of such evidence now, it is shown, is by misfortune and not by laches, as the deed was once made by his father who never withheld it or destroyed it, but it was accidentally lost.

The case presented by the bill is not one for specific performance of a parol contract for the sale of land, but to enable the complainant to show such equitable title thereto as will render null the defendant's deed, and thereby defeat the claim he makes thereunder. The indefiniteness of the contract does not necessarily go so far as to render it void. I think it was sufficient to show the character and extent of the complainant's occupancy and possession; and that was all that was necessary in this case.

The decree of the circuit court must be affirmed with costs.

The other Justices concurred.

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MICHIGAN COLLEGE OF MEDICINE v. THOMAS J. CHARLESWORTH.

Contracts—Mutuality—Personal liability.

1. Courts are not to make contracts between parties but are to enforce them.
2. Contracts cannot arise where there is no mutuality; and certainly not where one person not only had no intention of binding himself, but was not even supposed by the other to be making himself personally liable.
3. A tramp was run over by a locomotive in a railway yard. A surgeon being summoned to help him, telephoned the railway superintendent and asked if he should do so. The superintendent answered, yes. Nothing was said about pay, and in fact the superintendent had no authority to bind the railway company to pay for surgical aid. *Held*, that there was no contract upon which he was personally liable for it.

Error to Wayne. (Chambers, J.) June 18.—Sept. 23.

ASSUMPSIT. Defendant brings error. Reversed.

Alexis C. Angell and *Ashley Pond* for appellant. A promise to pay for medical services to another cannot be implied from merely calling the physician or assenting to his acting, even though the patient be a relation: *Buck v. Amidon* 4 Daly 132; *Smith v. Watson* 14 Vt. 338; *Boyd v. Sappington* 4 Watts 247; *Williams v. Brickell* 37 Miss. 682; an agent cannot be personally liable on a promise intended to bind his principal unless it would actually have done so if made within the scope of his authority: *Dung v. Parker* 52 N. Y. 494; *Baltzen v. Nicolay* 53 N. Y. 467; see *Hall v. Lauderdale* 46 N. Y. 75; *Barry v. Pike* 21 La. Ann 221; *Murray v. Carothers* 1 Metc. 81; *Ware v. Morgan* 67 Ala. 461; *Aspinwall v. Torrance* 1 Lans. 381; *Smout v. Ilbery* 10 M. & W. 1; *McCurdy v. Rogers* 21 Wis. 197; *Weare v. Gove* 44 N. H. 196; *Fowle v. Kerchner* 87 N. C. 49; *Walker v. State Bank* 9 N. Y. 587; *N. Y. &c. Co. v. Harbison* 16 Fed. Rep. 688; *Snow v. Hix* 54 Vt. 478; *Newman v. Sylvester* 42 Ind. 106; *Delius v. Cawthorn* 2 Dev. (N. C. L.) 90; *Ogden v. Raymond* 22 Conn. 379; *Beattie v. Ld. Ebury*

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L. R. 7 Ch. App. 777; *Weeks v. Propert* L. R. 8 C. P. 427; *Walker v. State Bk.* 9 N. Y. 587.

Trowbridge & Brewster for appellee. One who asks a physician to attend another is liable for the doctor's services: *Clark v. Meigs* 7 Vt. 76; if an agent so exceeds his authority in the contract made by him that the principal is not bound by it, he becomes himself liable to the person with whom he deals: Story on Agency (9th ed.) § 264; *Jones v. Downman* 4 Q. B. 235; *Mott v. Hicks* 1 Cow. 536; *Bay v. Cook* 2 Zabr. (N. J.) 343, 352; *Gillaspie v. Wesson* 7 Porter 454; see also *Feeter v. Heath* 11 Wend. 479, 485; *Meech v. Smith* 7 Wend. 315, 317; *Layng v. Stewart* 1 Watts & S. 222; *Weare v. Gove* 44 N. H. 196; *Underhill v. Gibson* 2 N. H. 352; *Dusenbury v. Ellis* 3 Johns Cas. 70; 1 Am. Leading Cases 636, notes.

CHAMPLIN, J. The plaintiff is a corporation existing under the laws of Michigan. Dr. Henry F. Lyster is a physician and surgeon residing at Detroit, and is president of the faculty of the Michigan College of Medicine. What his authority is, if any he has, to make contracts binding on plaintiff does not appear from the record before us.

The defendant is superintendent of the Detroit division of the Lake Shore & Michigan Southern Railway Company. On the evening of November 10, 1882, a person not a passenger or employee of the Lake Shore & Michigan Southern Railway Company was run over by an engine in the company's yard, by which his limb was crushed below the knee, and a messenger was sent (by whom is not disclosed) to Dr. Lyster to procure his assistance. The doctor had had some experience with the railroad company before, and there had been some dispute about bills which had been presented by the doctor for similar services; but such matter had been personal with the doctor and not with plaintiff. It appeared that this was the first instance where Dr. Lyster had taken a person injured on this company's road to the hospital connected with the Michigan College of Medicine. When the messenger called upon Dr. Lyster to render assistance to the injured person, he called up the defendant by telephone,

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and we quote from the testimony of the doctor as to what occurred:

"I called up Mr. Charlesworth. I knew he was the superintendent, and asked him if he wanted me to go down and attend this man who had been run over. He had not heard of the accident before. It was the first he had heard of the accident. It was late in the evening. It was a winter evening, and the telephone was the most ready method to reach him, and I told him that there had been a man there from the road who had come up for me. An employee said there was a man run over by one of their engines and severely injured. I wanted to know if I should go down and take care of him and attend him. He said, 'Yes.' I said, 'Shall I take him to a hospital,' and he said, 'Yes.' There was some other conversation. I don't remember the details of it exactly; something about the nature of the accident, who the person was, or something. I didn't know anything about it particularly. Nobody did at that time. And under that authority I went down and I telephoned for the ambulance to the hospital of the Michigan College of Medicine. It was the only ready method of conveyance that could be obtained, and the ambulance reported there. I dressed this man and took him to the hospital in the ambulance, and I was obliged to make an amputation that night."

Question. When you called the superintendent Mr. Charlesworth, up by telephone, what did you say to him—what was the substance of the conversation?

Answer. I have given you the substance pretty much.

Q. Was anything said about pay?

A. I don't think there was anything said about pay. I do not think there was anything said to Mr. Charlesworth about not having received pay for my services rendered formerly at the time when I called him up on the telephone. I don't remember anything now that I said, anything about those previous matters, alluding to them; I do not remember. I have given the conversation as I recollect it, as far as the main points of it, that I had in my mind, which related to getting authority to take him to the hospital. The details I don't remember further. There was something,—as it was the first intimation Mr. Charlesworth had of the injury,—something was said about that, but the details of the conversation I don't recollect beyond that. I think Mr. Charlesworth said something about it would not do to let the man suffer, or something of that kind. I took him to the hospital that

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night, and he stayed there until the twenty-ninth of December, from the tenth of November, 1882,—about seven weeks. I performed a surgical operation. He had been run over below the knee. The leg had all been destroyed by the wheels of the engine,—all crushed,—an injury that had severed his leg, and I amputated the leg at the knee joint that night. He was furnished during that time at the hospital with medicines, nursing and board, and all the necessary care was furnished by the hospital,—nursing, medicines, rations, fuel, lights, bedding and everything that is required under those circumstances. He was discharged from the hospital as soon as he could be with safety—as soon as he was well. He got well very quickly. He was kept there a very short time for cases of that sort. He was not kept there only about half as long as cases of that kind are kept in the hospital—case of an injury and operation. The charge was five dollars a week. It was less than a reasonable charge. It was made at a lower rate because it was a railroad company, and a good deal of business comes from railroad companies, so that we make a lower rate. The college presented the bill to the railroad company, and they declined to pay—the company to whom it was referred. Their attorney declined to pay it. The bill was sent to the superintendent by the hospital."

The witness identified a letter written by the superintendent as follows:

"DETROIT, December 22, 1882.

Dr. Henry F. Lyster, City—DEAR SIR: In relation to the bill you presented for attendance to D. O'Brien, would say there seems to be some mistake in the matter. You called me up on telephone and asked me about it. I said you had better go and look after him, as it would not do to let him suffer. This I done as an act of humanity, but it seems to me it is presuming a great deal to think that this covers his whole time of disability. It was the farthest thing from my mind. I only wished you to take care of him for the time,—to perhaps save his life. One of the officers of the college came down with a bill for board yesterday, and left word with my clerk that others would follow. It looks as if this was imposing on good nature. I have referred everything to Ashley Pond, our general attorney, who you can consult on the subject.

Very respectfully,

T. J. CHARLESWORTH, Superintendent."

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—which was read in evidence, as was also the following letter:

"THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.

CLEVELAND, O., February 9th, 1883.

MY DEAR SIR: I have received your letter of the first inst., respecting the bills of Dr. Lyster.

Herewith inclosed I send you copy of circular notice issued by the company in 1878. When this circular was issued it was generally distributed along the line, and we presume all parties interested saw the notice and understood the policy of the company.

Under this policy we must decline to pay the bill to Dr. Lyster.

Very truly yours, JOHN NEWELL, Gen'l Manager.

L. S. Trowbridge, Esq., Detroit, Mich.

The circular referred to was introduced in evidence as follows:

"THE LAKE SHORE & MICHIGAN SOUTHERN RY. CO.

To all Officers and Employees.

CLEVELAND, December 12, 1878.

Notice is hereby given of a change in the policy of this company towards employees who may be injured in the service.

Hereafter, the provision of surgical aid, nursing, hospital assistance or other needs for injured men must be made by the employees themselves; and this company will not assume any responsibility of any kind in respect of the expenses which may accrue from any accidents which may happen. No allowance for lost time on account of injuries will be made except in special instances, after approval from the general office. Every employee now in, or who may hereafter be employed in the services of the company, can only continue in or enter into the service of the company with the understanding that he assents to and will adhere to this rule.

CHARLES PAINE, General Superintendent.

L. H. CLARKE, Chief Engineer."

It was admitted that this circular was sent to defendant, as well as the rest of the employees of the road. Upon cross-examination Dr. Lyster testified as follows:

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"When I first saw this man I found him on the floor in one of the rooms down in the yard, very seriously hurt. I understand now that he was not an employee. I took him up to the college, and kept him there until the 29th of December from that night. After I took him to the college I don't think I had a conversation with Mr. Charlesworth with reference to paying his board bill. I don't remember any. I do not think I had any correspondence with him. He wrote me that letter. I will swear very positively to the two main points of what was said through the telephone that night. One was, whether I would get authority to go down and see the man, from Mr. Charlesworth; and the other was whether I had authority to take him to the hospital. These two points I swear to positively, because that was the reason I called him up. I don't recollect anything said about pay. My recollection is that there was some further conversation about the nature of the injury, etc., but nothing very definite.

Question. Now, as your evidence has shown, doctor, at that time you thought you were employed by the Lake Shore Road?

Answer. I don't think I would have selected Mr. Charlesworth out of the whole city of Detroit, although I had some evidence that he was charitable. I would not have selected him out as an individual; I selected him as superintendent of the road.

Q. And you bring your claim against him as an individual, after the road has refused to pay?

A. Yes, sir."

The plaintiff produced Annie McDougall, who was a nurse at the hospital, who gave evidence tending to prove that O'Brien was received at the hospital November 10, 1882, about nine o'clock at night, and received nursing, care and food, and was discharged the 29th of December,—as soon as he was well enough to be discharged without injuring his health.

Upon this testimony the plaintiff rested its case. The defendant's counsel then moved the court to take the case from the jury upon the ground that no evidence had been produced which would bind the defendant. The court refused, but stated he should leave the case with the jury under the following instruction, namely:

"That if the defendant authorized the taking of this man

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to that hospital at the request of the Michigan College of Medicine, being called on as superintendent of the road, by Dr. Lyster, and having, by that act, led the plaintiff to believe that he had authority to bind the road to take care of the patient, and he not having authority, if he exceeded his authority, that he would be personally liable, and if he had no authority at all to order it, and if the jury believe that was an order to keep the man there any length of time, then he is individually liable."

To which ruling and decision the defendant excepted, and this constitutes the defendant's first assignment of error.

The suit was commenced in justice's court. The record states that "the plaintiff declared orally in assumpsit upon all the common counts, and for professional services rendered, and claimed damages three hundred dollars or under." The plea was the general issue, and notice was given of a defense based upon the statute of frauds. In order to entitle the plaintiff to recover, it was incumbent upon it to prove that a contract was entered into, either express or implied, between the parties, based upon a sufficient consideration. That there was no express contract is conceded, but plaintiff contends that an implied contract exists under the facts and circumstances of the case—*first*, from what was said through the telephone; and *second*, from the want of authority of defendant to bind the railroad company. It is quite clear from the evidence that it was not the intention of Dr. Lyster that the defendant Charlesworth should be personally bound by what was said through the telephone, and it is equally clear that the defendant had no such intention. There was neither employment nor promise to pay for services to be rendered, either by plaintiff or Dr. Lyster. Under such circumstances how can it be possible that there should exist that mutuality of intention which justice requires as the foundation for every binding contract? The counsel for plaintiff asserts that it arises out of the fact that Dr. Lyster supposed that he was obtaining authority from the Lake Shore Railroad Company by obtaining the consent of its superintendent to take charge of the injured person and

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take him to a hospital; that the company now repudiates the bill for services, and it turns out that the superintendent had no authority from the company to consent to the employment of Dr. Lyster, and therefore defendant is personally liable.

Let us suppose, then, that Dr. Lyster intended to treat with the defendant in his individual capacity, and consider whether in that case there would be any liability. A person was injured requiring surgical assistance, nursing, care and attention. He was in no manner related to defendant. The defendant owed him no duty, morally or legally. He was called upon to perform no action other or different than that which appeals to the sympathies of our common humanity for a suffering creature, and in this respect, and toward this injured person, Dr. Lyster and the defendant stood upon an equal footing. The doctor, being informed of the accident, addressed the defendant, and received answers as follows: "I want to know if I shall go down and take care of him and attend him." *Answer*: "Yes." "Shall I take him to a hospital?" "Yes;" and added further, "It will not do to let the man suffer," or something of that kind. Is there sufficient in these circumstances and in this conversation to raise an agreement by implication that defendant would pay the doctor for services by him to be performed, and the hospital for board, nursing, care, etc? Manifestly not. Defendant had no beneficial interest in its performance. There was no duty or obligation resting upon him to employ a surgeon or engage admittance to a hospital. There was nothing in the language employed by the doctor to intimate to defendant that he was engaging his professional services to him. Nothing was said or implied from what was said about pay or recompense, and no promise, express or implied, by defendant, that he would pay or recompense for attendance and taking the injured party to a hospital. To hold that a binding contract existed between these parties would be to create a contract where none was intended, to impose obligations where none were assumed, and that to an extent which was entirely indefinite and unknown to the defendant. It is the province of courts to enforce, not to make, contracts between parties; and when the

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parties have failed to make binding engagements, the courts cannot supply, by intendment or inference, those essential elements which are required to constitute a valid agreement. The court below should have instructed the jury that on the plaintiff's own showing there could be no recovery, and directed a verdict for defendant.

The court having refused to direct a verdict for defendant, he introduced testimony which tended to prove that he did not make any contract with plaintiff either in his own behalf or as agent of the railroad company of which he was superintendent. He testified that he was not authorized by the Railroad Company to employ a surgeon on this occasion. He also testified to having received a letter from Dr. Lyster some time before the accident to O'Brien, of which the following is a copy:

"DETROIT, August 21st, 1880.

MY DEAR SIR: On the organization of the new clinical hospital for the reception chiefly of the sick and injured poor, two of the wards have been allotted to me to furnish and equip.

Medical and surgical services will be rendered, without charge to all coming upon the hospital foundation, by the large and experienced medical staff. Personally, I am very greatly interested in the success of the institution.

Very sincerely yours, HENRY F. LYSTER."

The witness states that this letter had no influence or bearing upon the conversation between himself and Dr. Lyster, as it was not in his mind at the time; that the first he knew of any charge being made to any person for the care and medical attendance of O'Brien was when the bill was presented to the Railroad Company therefor, respecting which he addressed the letter to Dr. Lyster of date December 22, 1882.

Upon the record before us, we do not consider that the defendant was individually liable to the plaintiff in this action. Whether an agent is personally liable, is a question of intention, and not an inference or conclusion drawn by the law (*Heald v. Kenworthy* 10 Exch. 739, 743), except in the sense in which the law deduces intention from language and holds

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parties to the legitimate result of their words and actions. 2 Smith's Lead. Cas. 383. We have already commented upon the words and actions relied upon by plaintiff as disclosing a cause of action against the defendant in this case.

We have refrained from passing upon the question raised by counsel for defendant, that in no case where a contract is made with an agent, which cannot be enforced because of the want of authority in the agent to make it, can the action against the agent be upon the contract, because treating the defendant as principal, and the language used as applied personally to him, there exists no contract liability for which he is responsible. *Buck v. Amidon* 4 Daly 132; *Smith v. Watson* 14 Vt. 332; *Crane v. Baudouine* 55 N. Y. 265; *Boyd v. Sappington* 4 Watts 247; *Williams v. Brickell* 37 Miss. 682; *Woods v. Ayres* 39 Mich. 345. The court should have charged the jury, as requested in defendant's first and second requests, to the effect that the defendant never promised to pay the plaintiff for the services and medical attendance and nursing sued for, and their verdict should have been for the defendant.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

ROBERT HILLOCK, TRUSTEE FOR THE USE OF BROWN & LEATON v. THE TRADERS INSURANCE COMPANY.

Fire insurance—Cancellation of policy—Tender of unearned premium—Estoppel.

1. The actual tender of unearned premium is unnecessary to the cancellation of an insurance policy if the minds of the parties have met on the point that the policy is to be cancelled; and if the insured directs the insurance agent to procure other insurance for him, it is presumable that he means him to use for the purpose the money that he would have to return, and the direction would be a waiver of such tender.

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2. Transactions with reference to the cancellation of an insurance policy are to be construed reasonably and fairly, and in accordance with the evident understanding of the parties at the time.

3. A partner's consent to the cancellation of an insurance policy in which the firm is interested is conclusive on the firm; and a formal surrender of the policy is unimportant, except as evidence of the cancellation.

4. A trustee for the beneficiaries in an insurance policy signed a written acknowledgment that the policy had been cancelled, and in making proof of loss to another company made affidavit that there was no other insurance. It was afterward claimed that he signed these documents without knowing what they contained. *Held*, that they did not estop him from claiming the first-mentioned insurance for the benefit of the cestuis que trustent.

Error to Isabella. (Hart, J.) June 19.—Sept. 13.

ASSUMPSIT. Defendant brings error. Reversed.

Norris & Uhl for appellant.

Dodds Bros. and *Benton Hanchett* for appellee. When a policy provides that "the insurance may be terminated at any time, at the option of the company, on refunding a ratable proportion of the premium for the unexpired term of the policy," the payment of the ratable proportion of premium is a positive condition precedent upon the performance of which the company's release depends, and unless payment of such part of premium has been made or amount tendered by company, the policy remains in force: *Van Valkenburgh v. Lenox Ins. Co.* 51 N. Y. 468; *Home Ins. Co. v. Curtis* 32 Mich. 405; Wood on Fire Ins. 231; *Poor v. Hudson Ins. Co.* 9 Ins. Law J. 428.

COOLEY, C. J. This is an action upon a policy of insurance against loss by fire, bearing date July 24, 1882, and covering the building known as the St. James Hotel in the village of Mt. Pleasant, Michigan, which was destroyed by fire August 29, 1882. The amount of insurance was one thousand dollars. The plaintiff recovered judgment in the circuit court.

The grounds of defense on the merits are principally the following:

1. That neither Hillock, the plaintiff, as trustee, nor Brown & Leaton, as beneficiaries, had such title or interest

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in the property as was represented when they applied for the insurance.

2. That the policy was cancelled before any loss occurred.

3. That no notice and proofs of the loss were made after the fire as the policy required.

Upon these points and many others elaborate argument has been had in this Court, but as the second goes to the foundation of all right of action, and as we think it appears beyond question that the cancellation took place as alleged, we do not deem it advisable to consider any other question.

Brown & Leaton were partners, and held the interest they had in the property as such. Brown was the active member of the firm in whatever was done touching this insurance. The policy was issued by Free Estee, the local agent of the defendant at Mt. Pleasant. Soon after its issue one Christianson, an agent of the company, who to some extent supervised for the company the local agencies, went to Mt. Pleasant and after examining the risks taken by defendant at that place, advised that the policy now in question be canceled. He directed Estee to cancel it, and the secretary of the company, under date of August 14, 1882, sent him written direction to cancel, and to "give it prompt attention." Estee thereupon called upon Brown, and notified him that the policy was canceled, and requested a return of the policy. Brown testifies that Estee told him the company refused to carry the risk any longer, and had ordered him to cancel the policy, but added, "I will see if I can put it in some other company for you;" and Brown said, "All right," and further, "Free, be sure that you put it in good companies." Brown says he was then on his way to the train; that he left it entirely to Estee; that he knew him to be careful and reliable in all these matters, and trusted that, as he had other insurance matters, to his judgment and management, because he was careful and reliable in every way; that Estee did not at the time pay or tender to him the unearned premium, and that there was nothing said about the premium at that time; that he had no other conversation with Estee before the fire; that there was another insurance upon the hotel at the time

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in the Hartford, but he had not seen either of the policies until quite a while after the fire, when he found them laid away in a drawer of a desk in his private library at his house, among miscellaneous papers, as he thinks, by his wife, but does not know.

Brown further testifies in answer to questions on cross-examination, that at the time of the fire he had no knowledge or intimation that there were any policies on the property except as from the conversation with Estee,—he trusted him to get insurance; that he did not know what had been done by Estee in that regard; that the policy in suit was never at any time in the possession of Hillock; that he did not think Hillock ever saw it; that witness did all the business and acted entirely for the parties in interest; that he had an interview with Estee the next day or next but one after the fire; that Estee inquired for this policy, and said if he would go up into the office he would give him the unearned premium due him from the company; that Estee told him he wanted the policy taken up, as it had been canceled, so he could return it to the company; that witness told him he had not found it and could not find it; that witness had looked for it through Brown & Leaton's papers, and at his house; that witness told Estee he was going away and could not stop, but that Estee could go up to the house and tell Mrs. Brown to look in his safe, and if she could find it she would give it to him; that the reason he assigned for not going up to get the unearned premium was that he was in a hurry to get the train and had no time, and that they could attend to that some other time just as well; that witness at that time had the impression that the policy had never been delivered to him and insisted on it up to the time that he found the policy in his private desk as before stated.

Brown further testified that in this first interview with Estee after the fire he was informed by Estee that he had not placed this risk in other companies as he had been requested to do, for the reason that they would not take it; he had made efforts to place it in other companies and they had declined. As to the delivery of this policy to him, he said

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that when he insisted with Estee that the policy had not been delivered to him, Estee was positive it had, and he then told Estee that the policy must have been misplaced, as he could not find it; that when looking for the policy at Estee's request, he intended to deliver it up; that from what Estee had said to him he at the time considered the policy canceled; that when Estee asked him to deliver it up, he stated that the company proposed to hold him liable, and Brown said to him "I don't intend that you shall be damaged in this matter in the least, because you have acted in good faith, and, sooner than have you injured, if there was any question, I would deliver up this policy;" that he did not intend to let Mr. Estee have any trouble; that at the time he regarded the policy as canceled, and would have surrendered it to Estee. He added: "If I knew I had it in my possession, and could have found it, and hadn't been going away, I presume I should have surrendered it to him." The unearned premium, he said, was never offered to him by Estee but once, and this was at the foot of the stairs to Estee's office, when Estee said if witness would go up stairs into his office he would pay him the premium out of his own pocket. Witness made no objection to receiving the money on account of its being Estee's. Leaton was the cause of his failure to accept.

Brown further stated that after the fire he was introduced by Estee to Christianson as the general agent, and Christianson demanded the surrender of the policy, and stated that it had been canceled, and there was no liability on the part of the company and nothing for them to pay, and was very emphatic in his demands for the surrender of the policy; that Christianson said it was the rule of the company and their instruction to their agents, that all these canceled policies should be taken up, and it was his duty to see that this policy was taken up; that this conversation was shortly after the fire,—perhaps a week or ten days, and may be more; that he replied to Christianson that the policy would not be surrendered until he could advise with Leaton, who was then absent, and that Leaton positively objected to the delivery or surrender of the policy and never assented to its

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being delivered up. He was then asked if Christianson did not ask him if the policy had been canceled, and if he did not reply that he so considered it, or words to that effect, and he answered that there may have been words to that effect; that he did not at that time assert any claim; that the conversation may have been a little animated, because he thought it unreasonable in Christianson in not wanting to give him a chance to advise with Mr. Leaton before demanding an eventual surrender of the policy; that he used words to the effect that as far as he was concerned he considered the policy canceled; that Christianson said, in speaking of the cancellation, that so far as the policy was concerned it was no more than so much waste paper, but the instructions of the company required that all canceled policies should be taken up, and it was his duty to see that the agents complied, and he wanted to get the policy and return it to the company. In answer to a question by plaintiff's counsel Brown further said that the reason why he considered the policy canceled, was because of the trouble in which Estee was placed. There was only one offer, he said, to pay back the premium money to him, and that was after the fire. Leaton never consented to the surrender of the policy.

Such was the testimony of Brown. It differs in some important particulars from that of Estee and Christianson, and in those particulars favors the plaintiff. The proofs of loss made for the purpose of recovering the insurance money from the Hartford company were made by Hillock, September 5, 1882, and in the sworn statement it is stated that in addition to the sum insured by the Hartford policy, there was no other insurance on the property, and on this statement the loss was paid in full by Estee and receipted by Hillock, who at the same time executed and delivered to Estee the following paper:

"Mt. Pleasant, Mich., Nov. 11, 1882.

I hereby acknowledge that policy No. 95,049, in the Traders' Insurance Company, issued to me on July 24th, 1882, for the amount of one thousand dollars, on St. James Hotel, was duly canceled by Free Estee, agent of said company, on August first day, 1882, and that all rights and claim

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under said policy was on that date by me surrendered to said company.

ROBERT HILLOCK, Trustee."

Of the statement Hillock testifies that he did not read it before he signed it; that he was not familiar with insurance matters, and depended on Estee's knowledge of the business, and supposed it was all right; that his recollection was that Estee said the company was here to fix up those matters, and he wanted to get that in shape so that Brown & Leaton could get their insurance; that he could not recollect whether Estee stated what was in the paper—what it was—but he said it was all right, and upon that statement the witness signed it. As to the other paper, the witness said he did not read it or hear it read, but it was presented to him by Estee; that he did not recollect exactly what Estee said about it, but he signed it the same way as he did the other; that Estee said it was all right, and then he signed it, and he does not think that Estee explained what he wanted him to sign it for; that the witness did not know when he signed it that it was an acknowledgment of cancellation of the Traders' policy, and that witness had no knowledge of that policy. On cross-examination he stated that he had not much recollection of the transaction, and that he presumed Estee stated to him the nature and character of the statement of loss which he swore to.

The proofs of loss under the policy of the Traders' Insurance Company were made June 18, 1883, and a copy sent to the company, which appears to have been received July 2, 1883.

This is the evidence upon which the plaintiff must rely as establishing the fact that the policy was in force at the time of the loss.

The policy provided that "this insurance may be terminated at any time at the option of the company on refunding a ratable proportion of the premium for the unexpired term of the policy." Estee, it is agreed on all hands, notified Brown of a cancellation; but it is denied by plaintiff that he returned the insurance money, or that before the fire he made

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any offer to return it. This is Brown's testimony: in this particular he is contradicted by Estee, but the jury have found Brown's statement correct, and it must be so considered. But this failure to return the premium, while it might in most cases be conclusive against a cancellation (*Home Ins. Co. v. Curtis* 32 Mich. 402; *Van Valkenburgh v. Ins. Co* 51 N. Y. 465) does not appear under the facts of this case to be of the least importance. Brown and Estee agree that notification was given of the cancellation, and that from that time they understood the cancellation to have taken place. Their minds met upon it, and but for the fact that Brown had forgotten that he ever received the policy, and did not then have it at hand, it would have been surrendered at that time. No hint appears of any doubt or contingency about it: Estee was told, even after the fire, that he could have the policy, and was sent to the house with authority to receive it if it could be found. The suggestion made on behalf of the plaintiff that Brown's acceptance of the cancellation was upon condition that Estee procure new insurance in some other good company, finds no support in the evidence. The company had an undoubted right to cancel, whether the assured assented or not; and Brown's direction to Estee to procure other insurance, which must have been upon the understanding that he would use the premium money for the purpose, was a waiver of any tender of its return to him at that time. All such transactions are to be construed reasonably and fairly, and in accord with the evident understanding of the parties at the time; and Brown makes it very plain by the full and frank statement he makes, that he and Estee both understood when he told Estee to procure new insurance, that the old was canceled. If it had been his purpose at the time to insist upon payment or tender as a condition of cancellation, it would have been his duty to say so; since otherwise Estee would be misled to his injury. But it is plain that he had no such purpose.

Estee, it seems, no doubt in good faith, in accordance with the understanding with Brown, did make effort to procure other insurance, but had not succeeded in doing so when the

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fire occurred. There was nothing then to insure, and nothing for Estee longer to retain the insurance money for. It is agreed that he then offered to return it, though he made no formal tender. But a tender was of no importance then; the dealings of these parties in respect to this insurance had come to an end when Brown had responded to the notice of cancellation that it was all right, and directed the agent to procure new insurance. This company was not concerned with what should take place between Brown and Estee afterwards. Brown was looking to Estee for new insurance, and would be entitled to a return from him of the premium moneys on a failure to obtain it; and Estee and the company would be expected to bring the amount into their own settlements, as they saw fit. And this was Brown's understanding until after the fire. In the first interview which then took place he was ready to surrender the policy if he had had it.

The failure to surrender the policy afterwards, when it was found, was in consequence of the objection of Mr. Leaton. If his assent was necessary, the defense would necessarily fail, for it clearly appears he never gave it. But it was of no consequence. Brown, as partner, had full authority to act for both, and what he did concluded both. A formal surrender of the policy was of no importance except as matter of evidence. But it would seem difficult to make the evidence of surrender more conclusive than it was here. Hillock, the trustee, in the following month gave a full and formal written statement of surrender, over his signature, and in his proof of loss to the Hartford company, made oath that there was at the time no insurance of the property except in that company. The suggestion rather than statement of Hillock that he signed the one paper and swore to the other without knowing what was in them, is entitled to no consideration whatever. There can be no safety in business transactions of any kind if formal documents may be thus put aside as of no moment. No charge of fraud is made in the procurement of these papers from Hillock, and no testimony warranting such a charge. The papers do not constitute an estoppel in this case, but they give such conclusive

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support to Brown's understanding as to the surrender as to leave it without question. But in fact his own evidence was conclusive.

Leaton, who was not the party by whom the business was transacted, appears to have believed in good faith that the policy was still in force, and he was entitled to raise the question as he has done. But to sustain his claim it is necessary to insist upon conformity to niceties of law and punctual observance of strict technical rules when the parties at the time did not require but in effect waived it, and when the result would necessarily be surprise and injustice. We cannot do this.

On a full examination of the plaintiff's evidence we think there was nothing in it to justify a submission of the case to the jury. The judgment must therefore be

Reversed and a new trial ordered.

The other Justices concurred.

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James W. Carr v. Alvah E. Leavitt.

Statute of Frauds — Verbal contract.

The statute of frauds in requiring contracts for the sale of lands or landed interests to be in writing, contemplates transactions between principals; it does not cover a bargain between a principal and his agent, whereby the latter is to be paid, for his services in obtaining lands, a certain proportion of the profits on their subsequent sale.

Error to the Superior Court of Detroit. (Chipman, J.)—June 29.—September 23.

Assumpsit. Plaintiff brings error. Reversed.

James W. Romeyn and *Don M. Dickinson* for appellant. An agreement in the nature of a partnership to buy and sell

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land is not within the statute of frauds: *Dale v. Hamilton* 5 Hare 369; *Smith v. Watson* 2 B. & C. 401; *Bruce v. Hastings* 41 Vt. 380; *Miller v. Kendig* 55 Ia. 174; *Benjamin v. Zell* 100 Penn. St. 33; *Bunnel v. Taintor* 4 Conn. 568; *Trowbridge v. Wetherbee* 11 Allen 361; *Linscott v. McIntire* 15 Me. 201: *Gwaltney v. Wheeler* 26 Ind. 415; *Hess v. Fox* 10 Wend. 439, distinguished from *Erben v. Lorillard* 19 N. Y. 299; *Bartlett v. Pickersgill* 1 Eden 515; *Harrison v. Bailey* 14 S. C. 334; *Hocker v. Gentry* 3 Metc. 474; *Smith v. Burnham* 3 Sumn. 458

Henry M. Duffield for appellee.

Cooley, C. J. Action of assumpsit. The plaintiff testified on his own behalf in substance as follows:

That defendant, in October, 1881, was desirous of purchasing from one Kearsley certain lots in the city of Detroit, and of procuring the services of the plaintiff in bringing about such purchase, and accordingly entered into the following contract with the plaintiff:

That the said plaintiff should employ his time and services in and about the purchase of the said property of said Kearsley at a price fixed between plaintiff and defendant, and in and about the management of the said Kearsley property, in case it should be purchased by the said defendant from said Kearsley; and that the said defendant did promise and agree with the said plaintiff that he, the said defendant, would furnish the means necessary to make the said purchase; and did promise and agree that in consideration of the said time and services of said plaintiff as aforesaid, upon the sale and disposition of said property, so to be purchased from the said Kearsley, he, the said defendant, would pay to the said plaintiff one-half the profits realized upon the said sale over and above the price paid therefor; and that the said plaintiff, in consideration of the said promises of said defendant, did promise and agree to and with the said defendant that he would contribute his time and services accordingly. And plaintiff alleges that by reason of his, the said plaintiff's, efforts, the said property was purchased at and for the price of $37,000, the price as aforesaid agreed upon, and said property was conveyed by said Kearsley and wife to the said defendant by a good and sufficient deed, dated the 31st day of March, 1882, which deed was placed in evidence, and

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that the same property was afterwards sold by the said defendant to Messrs. Hubbard, King & Hubbard, of said Detroit, at and for the price of $52,500, by a good and sufficient deed, which deed was placed in evidence. And that the said defendant, on demand, had refused to account or pay to the said plaintiff one-half of the profits realized on the sale, or any part thereof.

This being the plaintiff's case, and it being admitted that the alleged contract was not in writing, the defendant took the objection that the contract was void under the Statute of Frauds. The trial judge held the objection to be well taken, and directed a verdict for defendant.

If the contract the plaintiff relied upon was within the statute, it must have been because it contemplated a purchase and then a sale of certain lands. But the plaintiff was to be neither purchaser nor seller, and the contract did not contemplate that in any contingency an interest in the land was to be conveyed to or vested in him. It contemplated only that in a certain event the plaintiff should receive a share of the moneys that a sale of the land should bring. His interest was therefore in these moneys, and not in the land itself. And the moneys were to be payable to him in consideration of services performed. The profits on the two trades, to be brought about by the plaintiff, were to be taken as the measure of compensation, instead of any other that might have been agreed upon.

This surely was not a contract "for the sale of any lands, or any interest in lands," within the meaning of the Statute of Frauds. How. Stat. § 6181. That statute contemplates a transaction between parties contracting with each other as principals; and this was not such a transaction. In this case the plaintiff as agent undertook to perform for the defendant certain services, and the defendant undertook to make a compensation therefor, the amount of which should be contingent on the value of the services. It was assumed in *Bunnel v. Taintor's Adm'r* 4 Conn. 568, that such a contract was not within the statute, and there are many express adjudications to the same effect. *Trowbridge v. Wetherbee* 11 Allen 361; *Fiero v. Fiero* 52 Barb. 288; *Hess v. Fox* 10

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Wend. 436; *Bruce v. Hastings* 41 Vt. 380; *Bannon v. Bean* 9 Iowa 395; *Harben v. Congdon* 1 Cold. 221; *King v. Hanna* 9 B. Mon. 369: *Heyn v. Philips* 37 Cal. 529; *Lesley v. Rosson* 39 Miss. 368; *Benjamin v. Zell* 100 Penn. St. 33. Our attention has been directed to no cases which are opposed to these.

The defendant relies upon a number of decisions by this Court, which are supposed to have some bearing upon the case, but we fail to perceive their relevancy. Every one of them was a case in which an interest in lands was bargained for, and was to be acquired by one of the parties in pursuance of the terms of the contract. *Hillebrands v. Nibbelink* 40 Mich. 646, may be taken as an illustration. The alleged verbal contract was that a father would convey to his son a farm in satisfaction of a certain claim,—a contract as plainly within the statute as if the land were to be conveyed for an agreed price in money.

The judgment must be set aside and a new trial ordered.

The other Justices concurred.

GARDNER M. SKINNER v. GRACE CHURCH OF MOUNT CLEMENS. 54 543 124 198

Deed to non-existent grantee—Religious society.

1. A deed is void that runs to a non-existent grantee.

2. Episcopal churches are forbidden by law to acquire title to land until their articles of organization are recorded. How. Stat. § 4661. But the grantees of certain land deeded it as a church site for the use of a congregation that did not organize until several years afterward. After it was organized, however, the rector, who knew the facts, took from the successors of these persons, who were then the vestry of the church, a deed to a part of the land in satisfaction of a claim he had for unpaid salary. *Held*, that he was thereby estopped from afterwards suing the church for the amount unpaid, and the members of the vestry who had given the deed were also estopped from claiming that the amount had not been paid.

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Error to Macomb. (Stevens, J.) June 19.—September 23.

ASSUMPSIT. Plaintiff brings error. Affirmed.

A. L. Canfield and *O'Brien J. Atkinson* for appellant.

Martin Crocker for appellee.

SHERWOOD, J. This is an action of assumpsit, brought by the plaintiff in the Macomb circuit court, to recover a balance of $465 claimed to be due for his services as rector of Grace Church at Mt. Clemens. The case was tried in the court below by Judge Stevens without a jury, and a judgment rendered in favor of the defendant.

Special findings were made and filed by the judge, from which it appears that for several years prior to 1867 and up to the year 1871 there was a congregation in Mt. Clemens known as Grace Church which worshipped according to the forms, usages and religious belief of the Protestant Episcopal church, and elected a vestry and wardens, employed a clergyman and transacted the affairs of the church, but without being incorporated under the statute providing for the organization of such churches; that in October, 1867, Arthur J. Robertson conveyed lot 4 of said Robertson's addition to the village of Mt. Clemens to Robert P. Eldridge, Charles Wood, Thomas M. Crocker and William Longstaff, who paid therefor, and in December, 1867, they conveyed said lot to Grace Church of Mt. Clemens, for the purpose of a site upon which to construct a church building. The deed was made and delivered for the purpose aforesaid, without any other consideration. That soon after the receipt of said deed the congregation took possession of the lot, built a church on the west half thereof, and up to the time of the commencement of this suit have continually used and occupied the premises for church purposes, the east half of said lot remaining a vacant space, lying east of the church. That in 1872 said Charles Wood, being about to leave Mt. Clemens, executed a quitclaim deed of said lot to Eldridge, Crocker and Longstaff. That in 1871 the defendant was regularly organized

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and incorporated, and in July, 1874, the plaintiff was employed as rector of the defendant, and was to receive as compensation for his services a salary of $1000 per year. That at the expiration of the second year the defendant was indebted to the plaintiff to the amount of $465, and the plaintiff proposed to the defendant to receive in payment and full settlement of the amount due him on his salary for said two years, the east half of said church lot; and at a vestry meeting of the defendant, held November 11, 1876, called by the plaintiff as rector, a resolution was passed by which the proposition of the plaintiff was accepted, and the persons in whom the title of the lot was vested were instructed to convey said east half of said lot to the plaintiff. The plaintiff was present at said vestry meeting and was fully informed in regard to the action of the vestry respecting the conveyance to him of the east half of the lot. That November 14th, 1876, said Eldridge, Crocker and Longstaff, with their wives, in pursuance of the resolution passed by the said vestry, executed and delivered to plaintiff a deed of the east half of said church lot, which deed was received by the plaintiff without objection and placed on record. That it was the intention of the warden and vestry of said church, at the time of the passage of said resolution, to convey the title of the east half of said lot to the plaintiff in payment for the salary due him as aforesaid, and they understood that by the execution and delivery of said deed, made by said Eldridge, Crocker and Longstaff, that the title to said lot had been conveyed to said plaintiff. That plaintiff knew, at the time of the passage of said resolution by said vestry, and for some time prior thereto, that at the time of the execution of said deed from said Wood, Eldridge, Crocker and Longstaff to said church in 1867 said church had not been organized under the statute. That, from the foregoing facts, the court found the law to be that the effect of the execution and delivery of said deed, in pursuance of said resolution of said vestry, was to pass a title to the plaintiff which the defendant, and also Eldridge, Crocker and Longstaff, would be forever precluded from questioning, and that the plaintiff cannot maintain his action for

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the recovery of the balance of his salary for which said deed was given and accepted in settlement.

We think this finding of law by the court, from the facts above stated, is correct. The plaintiff claims he got no title under his deed of November, 1876, because of the deed made to the church in 1867, and therefore he has received no pay for the claim he makes in this suit. The defendant in this case was organized in 1871, under the statute providing for the organization of Protestant Episcopal churches, which says: "It shall not be lawful for such church to acquire the title to any property until such articles are recorded" (meaning organizing articles of agreement). How. Stat. § 4661.

There was no conveyance to the church after its organization. The deed relied upon by the plaintiff as divesting the grantors of their title was executed several years before there was any legal organization of this church. It is a well-settled rule of the common law that a deed running to a grantee not in existence is a nullity. 2 Bl. Com. 296; 4 Kent's Com. 462; *Jackson v. Cory* 8 Johns. 385; *Hornbeck v. Westbrook* 9 Johns. 73; Co. Litt. 3*a*; Co. Litt. 26*b*; 2 Washb. Real Prop. 566, 567. We know of no rule changing the common law upon this subject. The defendant could not, therefore, hold the property, and had no title thereto under the deed of 1867. Eldridge, Crocker and Longstaff still held the legal title to the property, notwithstanding such conveyance. The church acquired the right to take the title as soon as it was legally organized in 1871, and to make a legal contract for the services of its rector; and it appears that it was under such a contract that the liability of the defendant was incurred.

It further appears that the grantors in the first deed never repudiated their act or the intention to convey by their deed lot 4 to the church, and when a proposition was made to the church to pay the balance due its rector for clerical labor, by deeding to him the east half of the lot, he took such deed, and on ascertaining that the legal title was still in Eldridge, Crocker and Longstaff, the warden and vestry of the church, knowing that the actual interest was in the church, by a vote directed these three gentlemen holding the legal title, to make

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to plaintiff the deed, which they accordingly did. This deed was willingly accepted by the plaintiff, he knowing all the facts and circumstances, in full of his claim in this case. These proceedings, of course, conveyed complete title to the plaintiff, and forever estop all parties interested from claiming otherwise, either in law or equity.

The judgment of the circuit court must be
Affirmed with costs.

The other Justices concurred.

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BELLE H. WHEELER v. JAMES S. P. HATHEWAY ET AL.

Suit on residuary legatee's bond—Mortgage on decedent's estate—Interest on specific bequests.

1. The residuary legatee, in a proceeding against him by a general legatee upon his bond, has a right to examine the plaintiff fully as to what the latter has received from the testator's estate.
2. If a mortgage upon the estate of a testator is a bona fide indebtedness which the residuary legatee is bound to pay, it cannot be deducted from the amount of a general legacy.
3. Interest upon specific bequests runs from the testator's death; but in the case of general legacies it does not run until the expiration of a year from that time,—or in states where the law or the probate judge allows a year for paying debts and legacies, not until a year has passed since letters testamentary were granted; or, in the case of a residuary legatee, a year from the date of filing his bond.
4. Administration is closed on the approval and filing of an executor's bond as residuary legatee.

Error to Macomb. (Stevens, J.) June 19.—Sept. 23.

Proceeding by scire facias. Both parties bring error. Reversed.

Richard A. Watts for Belle H. Wheeler.

Norris & Uhl for James S. P. Hatheway.

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CHAMPLIN, J. This is scire facias upon a judgment rendered against defendants upon a bond given by James S. P. Hatheway as residuary legatee under the last will of Gilbert Hatheway. The plaintiff is a daughter and legatee of Gilbert Hatheway, and defendant Hatheway is brother of plaintiff. The cause was tried before the court without a jury, and a finding of facts and his conclusions of law therefrom were made and filed by the circuit judge. Both parties have brought the case here by writ of error.

We think the court erred in not permitting defendant's counsel to inquire fully of plaintiff, on cross-examination, relative to the property she received belonging to the estate of Gilbert Hatheway, the title whereof vested in defendant James S. P. Hatheway on filing his bond as residuary legatee. What such testimony proved, or to what extent, if any, it should be allowed to affect the extent of plaintiff's recovery, could only be determined after the testimony had been placed before the court. It was material and pertinent to ascertain from plaintiff what assets, if any, she held belonging to defendant Hatheway, and the facts and circumstances connected with the transaction would enable the court to decide whether it formed the basis of a legal set-off, or was in any other manner a defense, either wholly or partially, to the action. As this disposes of the case in this Court, it renders a decision of the other questions raised unnecessary; but as they are likely to arise on a new trial, it may be proper to intimate our views upon them as presented by this record. Under the facts found we do not think the money paid to take up the Cutter mortgage should be deducted from the legacy due to plaintiff. The court expressly found that defendant Hatheway paid it, and that it was a bona fide indebtedness against the estate, which the residuary legatee was obligated to pay.

The error complained of by plaintiff consists in not allowing interest on the legacy from the date of filing the residuary legatee's bond. The court computed interest from one year after the date of such filing, for the reason that it was

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customary for probate courts to grant one year for the settlement of estates before computing interest on legacies.

As a general rule, interest is payable on money on the ground of delay in paying the principal; and with respect to legacies it is payable on them from the time they are actually due. There is a distinction in this respect between specific and general legacies. Specific legacies are considered as severed from the bulk of the estate by operation of the will from the death of the testator, and appropriated for the benefit of the legatee from that period. Consequently, interest is computed on specific legacies from the death of the testator, whether the enjoyment of the principal is postponed by the testator to a future period or not. With respect to general legacies the rule is different. As to these, for convenience, the law, in the absence of statutory regulation, has prescribed the general rule that where no time of payment is named by the testator, and in the absence of any intention to be inferred from the will itself, such general legacies shall be raised and satisfied out of the testator's personal estate at the expiration of one year next after his death, from which period, if the executor omit to pay the principal, the legatees will be entitled to interest, though actual payment within that time may be impracticable. 2 Roper on Legacies 1245. This rule was founded on the principle that the assent of the executor to the legacy was essential before the title of the legatee to the legacy became complete or perfect, for without such assent the legatee had no authority to take possession of his legacy. The assent was required of the executor because the whole personal property of the testator devolved upon the executor. The civil law fixed for the purpose a year from the testator's death as the time when the executor's assent is presumed, and when the legacy is payable. This rule has quite generally been adopted by the English courts. *Wood v. Penoyre* 13 Ves. 326; *Barrington v. Tristram* 6 Ves. 345; *Clive v. Clive* Kay 600; *Bristow v. Bristow* 5 Beav. 289; *Child v. Elsworth* 2 De G., M. & G. 679; *Gibson v. Bott* 7 Ves. 96; *Pearson v. Pearson* 1 Sch. & L. 10.

In the American courts, in the absence of statutes regulat-

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ing the subject, legacies are regarded as due and payable at the end of the year from the death of the testator. But in those states where statutes or the judge of probate allows a year in which to pay debts and legacies, such legacies are not due until the end of a year from granting letters testamentary, and the interest should be computed from that time. *Jones v. Ward* 10 Yerg. 161; *Stephenson v. Axson* 1 Bailey Eq. 274; *Huston's Appeal* 9 Watts 473; *Graybill v. Warren* 4 Ga. 528; *Beal v. Crafton* 5 Ga. 301; *Bradner v. Faulkner* 12 N. Y. 472; *Cooke v. Meeker* 36 N. Y. 15. In this State the time within which the debts and legacies are to be paid is usually limited by the probate court, in the first instance, to one year from granting letters testamentary.

Such would undoubtedly be the time when the legacy would be payable, if the estate had been closed in the ordinary course of administration. In this case, however, the executor gave a residuary legatee's bond, which had the effect to close the administration of the estate from the approval and filing of the bond. And the plaintiff claims that the debts and legacies became due and payable as soon as such bond was filed. If this be so, then every creditor and every legatee could at once bring suit against the executor for the amounts due them, whether he had converted any of the assets into money or not. We think this would be a harsh and unjust doctrine, and not within the intention of the statute. There is no good reason why the legatee should be in any better situation with regard to the time when the legacy should be paid, by the filing of the residuary legatee's bond, than she would be if the executor had filed the ordinary executor's bond. It was not intended by the statute that either creditors or legatees should receive any greater benefit by way of accruing interest in one case than in the other. There are good reasons in both cases why the general legacies are not due or payable until one year from the granting of letters testamentary. This time is allowed to enable the executor to collect the assets and convert them into money for the purpose of paying the debts and legacies. In this

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respect there was no error in the ruling of the court below. For the errors mentioned the judgment is

Reversed, and a new trial ordered.

The other Justices concurred.

Orilla C. Bixby v. Muzzy J. Goss et al.

Township drains—Notice.

1. Proceedings to lay out a township drain, assess compensation and levy the drain tax are absolutely void as against a non-resident owner who is neither named in the proceedings nor notified thereof, and whose husband is treated as the owner.
2. Notice is necessary to jurisdiction in proceedings to run a township drain.
3. Certiorari lies to review township drain proceedings where the defects go to the jurisdiction.

Certiorari to township drain commissioners. Submitted June 19. Decided Sept. 23.

Olds & Robson for plaintiff in certiorari.

Cooley, C. J. This is a proceeding by certiorari, the purpose of which is to set aside the action of a township drain commissioner in laying out a township drain, assessing compensation to parties whose land was taken, and assessing a tax to cover the cost of the land and the drain.

Plaintiff is a non-resident of the State, and is nowhere named in the proceedings. Her husband is named, however, and it is assumed that he is owner of a quarter section of land which includes the land owned by the plaintiff. The assessment of compensation for land taken, and also of the tax laid for benefits, is made to the husband. Plaintiff, in the affidavit for certiorari, says that she had no notice, actual or constructive, of any of the proceedings while they were

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pending; and the record does not show that any was given. This being the case, the proceedings, as to this plaintiff, were absolutely void. The failure to give notice so that the parties concerned may have an opportunity to be heard in the proceedings is not to be deemed a mere error or informality, but as depriving the commissioner of jurisdiction to take further steps. The statute (How. Stat. § 1730) is therefore not applicable.

The proceedings must be quashed but without costs.

The other Justices concurred.

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The Forncrook Manufacturing Company v. The E. T. Barnum Wire & Iron Works.

Petition for removal of cause—Estoppel—Patents.

1. Objections to the form of a petition for the removal of a cause from a State to a Federal Court are rather for the latter to consider than the former, as the Federal Court should decide for itself with what precision and directness the right to removal must be shown. So *held*, where it was objected that the petition for removal presented only the pleadings, and did not specify the Federal question involved.
2. One who has contracted for the right to manufacture under a certain patent is in no position, when sued on the contract, to set up rights under a subsequent patent as a justification for non-performance, or to question the validity of the first patent, especially if fraud in the contract or infringement of patent is not alleged.
3. A patentee sued one who had contracted for the right to manufacture under the patent, and it appeared that questions might arise as to whether the manufacture had been carried on under this patent or another and whether the latter was valid as against the former. Defendant had the case removed to a Federal Court. *Held*, on error, that the conflict of patents was the Federal question, if any; and though it was barely presented, the writ of error would be dismissed and the plaintiff left to move in the Federal Court.

Error to the Superior Court of Detroit. (Chipman, J.) June 20.—Sept. 23.

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ASSUMPSIT. Plaintiff brings error. Dismissed.

Fraser & Gates for appellant. A state court ought not to relinquish jurisdiction until a case is made which on its face shows that removal is of right: *Mahone v. R. R. Co.* 111 Mass. 72; *Bryant v. Rich* 106 Mass. 180; *Du Vivier v. Hopkins* 116 Mass. 125; *Insurance Co. v. Gorbach* 70 Penn. St. 150; *Hadley v. Dunlap* 10 Ohio St. 1; *Whiton v. R. R. Co.* 25 Wis. 437; *Akerly v. Vilas* 24 Wis. 165; *People v. Sup. Ct.* 34 Ill. 356; *Del. Railroad Co. v. R. R. Co.* 46 Ia. 406; *Burch v. Dav. & St. P. R. R.* 46 Ia. 452; *Atlas Ins. Co. v. Byrus* 45 Ind. 133; *Mc Whinney v. Brinker* 64 Ind. 360; *Blair v. W. P. Mfg. Co.* 7 Neb. 146; *Orosco v. Gagliardo* 22 Cal. 83; *Clark v. Opdyke* 10 Hun 383; *Carswell v. Schley* 59 Ga. 19; *Henen v. B. & O. R. R.* 17 W. Va. 881; *B. & O. R. R. Co. v. P. W. & Ky. R. R.* 17 W. Va. 812; *State v. Judge &c.* 23 La. Ann. 29; *Tunstall v. Madison* 30 La. Ann. 471; *Kimball v. Evans* 93 U. S. 320; *Ins. Co. v. Pechner* 95 U. S. 183; *Amory v. Amory* 95 U. S. 186; *Removal Cases* 100 U. S. 474; *Bible Society v. Grove* 101 U. S. 611; *Babbitt v. Clark* 103 U. S. 610; *R. R. Co. v. Koontz* 104 U. S. 5; *Crane v. Reeder* 28 Mich. 527; *Mabley v. Judge Sup. Ct.* 41 Mich. 33; *Schwab v. Coots* 48 Mich. 116; *Whittemore v. Stephens* 48 Mich. 573; the petition for removal should state the precise facts out of which the jurisdictional question arises: *Ex parte Anderson* 3 Woods 124; *Trafton v. Nougues* 4 Cent. L. J. 230; *Levy v. Laclede Bank* 18 Fed. Rep. 193; *Gold Washing Co. v. Keyes* 94 U. S. 199; the fact that defendants own patents with which those of plaintiff are supposed to conflict is no answer to a suit brought for royalties due on articles manufactured: *Consolidated Middlings Purifier Co. v. Guilder* 9 Fed. Rep. 155; *Hall Mfg. Co. v. Am. Ry. Supply Co.* 48 Mich. 331; and defendant is estopped from denying the validity of plaintiff's patents: Bigelow on Estoppel 433, 434; *Jones v. Burnham* 67 Me. 93; *Kinsman v. Parkhurst* 18 How. 289; *Eureka Co. v. Bailey Co.* 11 Wall. 488.

Moore & Canfield for appellee.

COOLEY, C. J. The only question in this case is whether a case was made by the defendant for removal to the Federal court. The Superior Court entered an order for removal, and error is brought upon that order.

The declaration in substance alleges that on December 23,

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1882, plaintiff was the owner of two letters patent, one dated February 11, 1879, and the other March 22, 1881, issued by the United States to Isaac S. Forncrook, plaintiff's assignor, for certain improvements in cheese-safes: that then and for several years previous plaintiff and its assignor had been extensively engaged in manufacturing throughout the United States cheese-safes embracing said patented improvements, had spent large sums in introducing them to the public, had thereby established a business with a good-will worth ten thousand dollars, and were daily receiving orders for great numbers of said cheese-safes; that the most excellent improvements consisted of a ventilating curtain door, etc., and glass corners. These, to be useful and to preserve said good-will, must be constructed in a certain specified manner, and all orders for them must be filled, and the demands of the market then required twenty thousand such cheese-safes yearly.

That thereupon a written contract was made between plaintiff and defendant, whereby the plaintiff assigned said letters patent with said good-will, to defendant for five years, agreed to suppress all infringements, and to turn over all its orders and inquiries for cheese-safes to defendant. In consideration whereof defendant agreed to use due diligence in the manufacture of such cheese-safes as the demands of the market required, and to fill all orders for such cheese-safes, and on July 1st and January 1st of each year, and at the end of said five years, to render an account, and pay plaintiff fifteen cents for each such cheese-safe sold by defendant.

That plaintiff thereupon prepared and defendant sent to plaintiff's customers throughout the United States a circular, stating that thereafter defendant would manufacture such cheese-safes, and requesting that orders for such cheese-safes be sent to defendant: that notwithstanding this, plaintiff continued to receive orders for great numbers of such cheese-safes, and turned all of them over to defendant; that defendant did not manufacture the patented improvements in a proper manner, and failed to manufacture as many of them as the demands of the market required, thus greatly injuring the good-will and reputation of plaintiff's improvements; that

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during the first and second six months of 1883 defendant manufactured and sold twenty thousand such cheese-safes, and neglected and refused to account or pay the royalty, to plaintiff's damage, etc.

There was a second count in which the substantial injury alleged was that defendant had manufactured and sold twenty thousand other cheese-safes which imitated and resembled plaintiff's improvements, etc., and that defendant refused to account and pay the royalty. There were also counts for money had and received, and counts on another contract not relating to patents.

Defendant pleaded the general issue, with notice that if it had manufactured and sold any cheese-safes, as alleged, the same were embraced and covered by two letters patent issued to one Gordon, June 8, 1880, and December 30, 1881, and by him assigned to E. T. Barnum & Co., and that they were not an infringement of plaintiff's patents, and the safes did not in anywise imitate or resemble plaintiff's patented improvements. That the right of defendant to manufacture and sell these cheese-safes was fully guaranteed and protected by the Gordon letters patent, and that plaintiff's letters patent are void under the patent laws of the United States.

This abstract sufficiently presents the issue. After the plea and notice of defense had been filed, defendant presented a petition for the removal of the case to the Federal court. The petition stated the substance of the pleadings, and without further presentation of facts, prayed for the removal of the cause. The required bond was given, and the removal ordered.

Plaintiff contends that the petition for removal is insufficient in form under the decisions in the Federal courts; that a mere statement of the pleadings, which leaves the court to hunt through them for the Federal question, is not sufficient, but that the question itself should be distinctly stated and the facts recited to show how it will arise. *Gold Washing &c. Co. v. Keyes* 96 U. S. 199; *Ex parte Anderson* 3 Woods 124; *Trafton v. Nougues* 4 Sawy. 178. It is also contended that under the pleadings it appears affirmatively that no Fede-

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ral question can arise; the defendant by its contract being estopped from raising any question as to the validity of the plaintiff's patents (*Eureka Co. v. Bailey* 11 Wall. 488; *Hall Manuf'g Co. v. Amer. Railway Supply Co.* 48 Mich. 331; *Jones v. Burnham* 67 Me. 93), and the Gordon patents being unimportant to the controversy.

So far as the objection to the petition goes to its form, we think it addresses itself rather to the Federal than to the State court. That court should decide for itself with what precision and directness it will require the right of removal to be shown; the State court has no occasion to insist upon any particular degree of strictness in these petitions. The question of sufficiency in substance is more difficult. The plaintiff, we think, is quite correct in insisting that defendant is in no position, under its contract, to raise any question of the validity of the plaintiff's patents. The pleadings make no question of fraud in the procurement of the contract, or of infringement by the plaintiff upon any prior patent; and it seems very plain, therefore, that defendant cannot set up rights under a subsequent patent as a justification for a refusal to perform its contract.

Nevertheless, under the claim for royalty on safes actually manufactured by the defendant, it may be that a question will arise, not only whether safes made are to be deemed made under the plaintiff's patents and not under those issued to Gordon, but also whether the Gordon patents are valid as against those of the plaintiff. This last question is the Federal question in the case, if there is any, and it is presented so vaguely that it is difficult to say it is presented at all. We incline, however, to leave the plaintiff to a motion in the Federal court, and shall therefore

Dismiss the writ of error, but without costs.

The other Justices concurred.

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JAMES NUGENT v. DANIEL NUGENT AND EMANUEL NUGENT. 54 557 / 155 : 2

Re-opening foreclosure sale.

1. Re-opening a foreclosure sale is so far within the discretion of the trial court that the Supreme Court is not disposed to disturb an order permitting it, where the discretion has not been abused.
2. A foreclosure sale may properly be re-opened for want of notice of the order for sale, or of the confirmation thereof, and for gross inadequacy of price, especially if the petitioner for a re-sale gives bonds to produce a purchaser at a higher price.
3. Where a mortgagee is the purchaser on foreclosure, and the sale is objected to for inadequacy of price, objections to re-opening it are open to scrutiny.

Appeal from Kent. (Montgomery, J.) June 20.—Sept. 23.

FORECLOSURE bill: petition to set aside sale. Complainant appeals. Affirmed.

James Nugent, in person, and *T. J. O'Brien* for complainant. Where there is no fraud, misconduct or surprise that should invalidate a sale, it will not be set aside: *White v. Coulter* 1 Hun 608; *Duncan v. Dodd* 2 Paige 99; *Whitbeck v. Rowe* 25 Howard Pr. 403; *McCotter v. Jay* 30 N. Y. 80; *Am. Ins. Co. v. Oakely* 9 Paige 259; in New York neither before nor after the confirmation of the report of the sale will a re-sale be ordered upon an offer of an increase of price alone: *Lefevre v. Laraway* 22 Barb. 167; see also *West v. Davis* 4 McL. 241; *Morice v. Bishop of Durham* 11 Ves. Jr. 57; *White v. Wilson* 14 Ves. Jr. 151; *Williamson v. Dale* 3 Johns. Ch. 290; a much stronger case must be made to set aside a sale under a decree in chancery, after confirmation of the report of the sale than before: *Bullard v. Green* 10 Mich. 268.

Taggart & Wolcott for defendants. Inadequacy of price, surprise or misapprehension are all good grounds for setting aside a sale when a party moves in a reasonable time: Rorer on Judicial Sales, §§ 398, 404, 411, 421, 422, 423; *May v. May* 11 Paige 201; *Williamson v. Dale* 3 Johns. Ch. 292; *Tripp v. Cook* 26 Wend. 143; *Hubbard v. Taylor* 49 Wis. 70; *Kemp v. Hein* 48 Wis. 32; whether the misapprehen-

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sion is caused by the purchaser or others, it will be ground for setting the sale aside: *Strong v. Catton* 1 Wis. 471; *Collier v. Whipple* 13 Wend. 225.

SHERWOOD, J This case is an appeal from the order of the Kent circuit court in chancery, setting aside a sale made upon the foreclosure of a mortgage upon real estate. The sale was made September 6, 1883, and the complainant became the purchaser, on the sale of the premises, for $946.64, that being the amount due on the decree; and on filing the commissioner's report of sale, the usual order of confirmation was entered, but no notice of the sale or of the order was ever served on the defendant or his solicitor.

On the 17th of September following, the defendant, Emanuel Nugent, made and presented his petition, asking that the sale be set aside for the reasons (1) that the property was advertised and sold without his knowledge; (2) that the property was sold at too great a sacrifice; (3) that the costs in the case were never taxed, or, if they were, he had no notice of the taxation, and his solicitor had never advised him of the proceedings to sale; (4) that he would have redeemed the property from the decree before, but for the reason that an effort was then being made in a chancery proceeding to subject his title to the land to the satisfaction of another pretended lien, by way of execution, on the ground of fraud; (5) that the land was worth $3000, and that, subject to the life-estate of his mother, it was worth at least $2000, and offered to give security to find a purchaser who would give $500 more for the property than it was bid off at on the sale.

An order, it seems, was made by the court upon this petition denying the prayer of petitioner, but never entered, and on the 19th of October following the same defendant made application to vacate the order announced as aforesaid, and for an order directing a re-sale of the property, and based the application upon the following facts, viz.:

"1st. Because the affidavits read upon said first application to set aside said sale as to the value of said mortgaged prop-

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erty were a surprise to this defendant, and he had no opportunity of replying thereto, and the same were not in accordance with the facts.

2d. Because the sale made under decree in this cause was without the knowledge of this defendant or his solicitors, and the property was sold to complainant for less than one-half its real value, and the defendant was surprised by such sale.

3d. Because said sale was made before the costs were taxed herein or any valid taxation thereof made, and this defendant was misled by a sale made before the taxation of costs herein.

4th. Because there was a misunderstanding of counsel for complainant and this defendant, which led this defendant and his counsel to believe that no sale was advertised or had, and they had no knowledge thereof until the day when the first application to set aside said sale was actually made.

5th. Because defendant, Emanuel Nugent, had filed his bond to the register of this court in the penal sum of $1500, with sureties, conditioned to raise the bid actually made, in the sum of $500, and to vary such bond in form as the court may direct, and has offered to raise the bid on said premises to $2300, subject to life-leases thereon.

6th. Because this defendant and his counsel were misled to believe no sale would be made when made, by the filing of a bill at the instigation of complainant litigating the title of this defendant to said premises.

7th. Because this defendant is greatly damaged by said sale, and suffers great loss if the same is allowed to stand, and it operates as a fraud upon him, and the same is irregular."

A large number of affidavits were presented for and against the motion of defendant, but after a full hearing and careful consideration given to the matter of the application the circuit judge granted the motion for a re-sale of the premises, and made an order accordingly.

I do not think the order made should be disturbed. There is a great discrepancy as to the value of the premises between the affidavits of the two parties, but the circuit judge has found against the complainant on the showing made, and from the record I think his conclusions well supported. The question presented is one resting largely in the discretion of

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the court, and we should not interfere unless it satisfactorily appears such discretion has been misused. No notice of the order asked to be vacated, or of the order of sale or confirmation, had been given the defendant, and the defendant has taken his remedy at the first opportunity after such notice. In such a case less showing is required to set aside a sale than after confirmation and notice thereof, and the sale becomes absolute under the rules. The grounds upon which the defendant bases his motion are good, and when made in time and properly supported are usually sufficient to secure the relief asked.

In this case the property was bid in by the mortgagee. In such case the court will look closely to the objections to the order for a re-sale, based upon the ground of inadequacy of price bid. In this case the applicant accompanies his motion with an offer to pay $2300 for the property on a re-sale, as against $1400 bid on the first sale. The order permitting this to be done, under the showing made, we think, was proper, and should be

Affirmed with costs.

The other Justices concurred.

Roderick L. Van Ness v. Hiram S. Hadsell.

County treasurer—Accounting—Estoppel—Compounding felony—Business books in evidence—Receipts.

1. Assumpsit on the common counts lies at the suit of a county treasurer against his official predecessor, for the amount of county moneys which the plaintiff has accounted for to the county as received from defendant but which in fact has not been so received.

2. It is not compounding a felony for an official to account for moneys as received from his predecessor, and himself assume their payment upon the latter's assurance that he will make the amount good if the accounts are incorrect.

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3. A county treasurer who, in settling with the county, has charged himself with certain money as received from his predecessor, when it has not in fact been received, is not estopped, in suing his predecessor for the amount, from claiming that the latter had not paid it.

4. A county treasurer's entries on his official books of the balances remaining at the end of his term are evidence against him as admissions of the amount which he has paid over to his successor.

5. A county treasurer's books are admissible in evidence in an action involving the amount turned over to his successor, and alterations in the entries cannot be presumed unless they are manifest, nor presumed to be wrongful.

6. In an action by a county treasurer against his predecessor for moneys which the latter should have paid over to him, inquiries into plaintiff's private business or his bank account are impertinent unless there is some offer to show that they bear on the issue whether the money has been paid over.

7. Receipts relied upon by a defendant in assumpsit as covering the money sued for must be produced; or sufficient reason must be given for not producing them, as a foundation for secondary evidence.

8. A county treasurer sued his predecessor for moneys which defendant should have paid over but had not, and defendant sought to dispute an entry on his own books which showed the receipt of money from a certain township. *Held* proper for the court to suggest that he should have resorted to the township treasurer to show that it was not paid.

Error to Cass. (A. J. Smith, J.) June 20–24.—Sept. 23.

ASSUMPSIT. Defendant brings error. Affirmed.

M. L. Howell for appellant. A county treasurer is required to keep his books correctly, and public policy should estop him from claiming that he made false entries: *People v. McKinney* 10 Mich. 96; *Detroit v. Weber* 29 Mich. 28; no less accuracy is permitted in them than in the return of a sheriff; and a sheriff cannot dispute his own return in any action to which he is a party: *Townsend v. Olin* 5 Wend. 207; *Gardner v. Hosmer* 6 Mass. 325; *Phillips v. Elwell* 14 Ohio St. 240; *Hustick v. Allen* Coxe (N. J.) 168; *Sheldon v. Payne* 7 N. Y. 453; *Egery v. Buchanan* 5 Cal. 56. See *Boone Co. v. Jones* 54 Iowa 699; *Morley v. Metamora* 78 Ill. 394; *Roper v. Sangamon Lodge* 91 Ill. 518; *Chicago v. Gage* 95 Ill. 625; *Gingrass v. Iron Cliffs Co.* 48 Mich. 413; the county treasurer's books are presumed to show the amount

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due from the treasurer to the county: *State Bank v. Chapelle* 40 Mich. 447.

Harsen D. Smith for appellee.

CAMPBELL, J. Van Ness, who was Hadsell's successor as county treasurer of Cass county, sued the latter and recovered for a balance of $800, for which plaintiff had accounted as received from defendant, when in fact there was so much not turned over to him. A good many errors are assigned, but they rest on a few grounds.

We can see no reason why recovery was not proper under the common counts. The money in question was county money which defendant claimed to have accounted for to plaintiff as his successor, and which plaintiff originally supposed had been accounted for, and so credited to the county as against himself. It became plaintiff's money by his settlements, and he was the person to whom it should have been paid by defendant. It is a very simple case.

The objection that charging himself and reporting it to the county as funds on hand, under his arrangement with defendant, was a compounding of felony and unlawful, is of no force. It may have shown that defendant got some advantage of plaintiff in persuading him that the account should be made good, if incorrect, and so inducing him to assume the burden; but it was no wrong in plaintiff to pay the county what defendant ought to have paid, and had agreed to make good if the accounts were incorrect.

Neither is there any force in the argument that, because plaintiff, in his accounting, charged himself in favor of the county with this money, he is estopped from claiming that defendant had not actually paid it to him. The county might, with some force, set up a claim that he should make good his own representations and admissions, if he had attempted to evade them; but no one else had any concern in his entries. The idea that a debtor, because some one else has been induced by him to advance money to the creditor on his behalf, can repudiate his liability to refund the advances, is not very plausible.

The defendant's entries on his own official books were evi-

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dence against him to the extent of their admissions, and the burden was on him to show that he paid over to his successor the balance appearing there. There is nothing in the record to indicate any reason why they should not have been accepted, and the court was right in holding him to that burden. The books were admissible under any circumstances, and if it was claimed they had been altered, that could not be presumed to have been done at all, unless manifest, nor presumed to have been done wrongfully. The record does not indicate that any further instructions were called for than were given. It does not inform us of any such occasion.

We see no pertinency in the attempt to inquire into plaintiff's private business or his bank account. It could not, under any offer that was made, have had any bearing on the issue whether defendant had paid him. There was no offer to prove anything which would have thrown light on this fact.

If defendant's defense rested on receipts which he claimed as covering the money in question, the court was quite correct in holding that he must either produce them or give some good reason for not doing so. This is required as a foundation for secondary evidence.

It was not error to hold that when defendant's books showed a receipt of money from a township, which he desired to dispute and claimed to have been a changed entry, he should have resorted to the township treasurer to show it was not paid to him. The court did not shut out any other testimony, but this was obviously a proper suggestion, as it must be presumed the town treasurer would take and preserve vouchers of his payments, and would have means of recalling or disputing them.

The judge does not seem to have been favorably impressed with the defense, but we find nothing in his remarks, so far as covered by any exception, to indicate that he gave any wrong rulings, or in any way misled the jury, or interfered with their functions.

The judgment must be affirmed.

The other Justices concurred.

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ANTHONY BARLAGE, JR. v. THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

Condemnation of lands belonging to decedent's estate—Payment of award—Executor's responsibility.

1. Possession of real estate could, under the law of 1846 (Rev. Stat. 288, § 7), be held by an executrix, and was in the right of heirs and devisees; and the executrix could resist possessory suits therefor without joining the heirs as defendants.

2. An award paid to an executrix upon the condemnation of land belonging to the estate, would be sustained, under the law of 1846, as paid not only for her personal interest, but for those which she represented as executrix.

3. The appearance of the executrix alone as respondent in condemnation proceedings against the estate, was *held* to give jurisdiction where the estate was in solido and was still in administration; the rights of heirs and devisees would be secured by her personal liability and that of her sureties.

4. Where a widow as executrix receives money belonging to the estate it is presumed that she accounts for it, and if she does, the heirs, in receiving it, waive all errors. And it is the same in legal effect if the heirs do not receive the money specifically awarded to them but on final settlement are paid their shares. After a great lapse of time, *e. g.* 30 years, it is presumed that full settlement was made.

Error to the Superior Court of Detroit. (Chipman, J.) June 24.—September 23.

EJECTMENT. Defendant brings error. Affirmed.

W. H. Russell and *Geo. Jerome* for appellant. The record of condemnation proceedings in accordance with statute, is a sufficient defense to ejectment for the premises: *Coon v. Fry* 6 Mich. 506; *Howard v. Moore* 2 Mich. 226; *Smith v. Milton School Dist.* 40 Mich. 144; if the court acted within its jurisdiction its proceedings are presumed regular; and after a great lapse of time its jurisdiction cannot be collaterally attacked: *Grignon v. Astor* 2 How. 339; *Sheldon v. Newton* 3 Ohio St. 494; *Thompson v. Tolmie* 2 Pet. 165; *United States v. Arredondo* 6 Pet. 729; *Telford v. Barney* 1 Greene (Ia.) 581; *Hannibal &c., R. R. Co. v. Morton* 27

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Mo. 317; *Wagers v. Dickey* 17 Ohio 439; *Coil v. Willis* 18 Ohio 30; 1 Greenl. Ev. § 19; the award need not be apportioned among the parties in interest: *E. Sag. & St. Clair R. R. Co. v. Benham* 28 Mich. 459; *Mich. Air Line Ry. v. Barnes* 44 Mich. 222.

Conely, Maybury & Lucking for appellee.

COOLEY, C. J. The plaintiff, by conveyances from the heirs of Joseph Ellair, who died in 1846, has become the owner in fee-simple of a strip of land thirty feet in width, from the southerly end of lot eleven south of Franklin street, on the Louis Moran farm in the city of Detroit, unless the proceedings to appropriate the same for the purposes of the Detroit & Pontiac Railroad Company, taken in the year 1851, were effectual, which the plaintiff denies. The facts in the case are for the most part agreed upon by the parties, and they appear to be the following:

Joseph Ellair was the owner of the land in fee-simple at the time of his decease. He left a will, which was duly probated in Wayne county, Michigan, by which he devised the land to his widow, Marie Florence Ellair, for life, with remainder to his ten children. The widow was made executrix of the will, and qualified and acted as such. She died in 1881. The railroad company, on May 5, 1851, presented its petition to Charles Peltier, Esq., a justice of the peace for the county of Wayne, setting forth that in making a proposed extension of their road it was necessary to construct it over the lands in question; that the owners of said lands, as petitioner was informed and believed, were said Marie Ellair, for life, and Peter N. Ellair, Charles Ellair, Eli Ellair, Francis Ellair, Josette Ellair, Flora Ellair, Flavia Ellair, Theresa Ellair, Emily Rivard, wife of John B. Rivard, and Archange Fraser, wife of Claude Fraser, of the reversion, the two last being femes covert, and that petitioner could not agree with said owners for the purchase or occupation of said lands. The petitioner therefore prayed that a jury be summoned to value the damages which the owners would sustain by the use and occupation of said land by petitioner for its railroad.

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The persons here named as owners of the reversion were the heirs at law of Joseph Ellair, and it now appears that Flavia, Eli, Francis and Theresa were at that time under the age of twenty-one years; that Emily Rivard had deceased, leaving an infant heir; and that Josette Ellair had been married, and had also died, leaving an infant heir. These infant heirs of Emily and Josette were not taken notice of in the proceedings, nor was the infancy of Flavia, Eli, Francis and Theresa mentioned. Justice Peltier issued his warrant for the summoning of a jury as prayed, and eighteen persons were summoned to convene May 12, 1851. Notice of the convening of the jury was issued, addressed to all the persons named in the petition, but it does not appear to have been served upon any one but the widow. On May 12th the persons summoned came together at the office of the justice, and James A. Van Dyke, a member of the Detroit bar, appeared for the estate of Joseph Ellair. Six names were struck from the panel, as required by law, and the twelve whose names remained proceeded to assess the damages. The following is a copy of their finding:

"*State of Michigan, County of Wayne, ss.*: We, the undersigned jurors, duly summoned and sworn under 'An act to incorporate the Detroit & Pontiac Railroad Company,' approved March 7, 1834, and 'An act authorizing a connection between the Detroit & Pontiac and Oakland & Ottawa Railroads, and for other purposes,' approved March 20, 1850, justly and impartially to value the damages which the owner or owners will sustain by reason of the use and occupation by the Detroit & Pontiac Railroad Company of the following described premises [describing them], and being freeholders of the county of Wayne and not in any way interested in the matter aforesaid, nor related to the parties in interest; having met upon said premises this day at one o'clock P. M., and examined the same, do find upon our oaths that the damages which the owner or owners thereof will sustain by reason of the use and occupation of said premises by said Detroit & Pontiac Railroad Company for the purpose aforesaid, is the sum of four hundred dollars. In testimony whereof we have hereto set our hands and seals this 12th day of May, in the year of our Lord one thousand eight hundred and fifty-one." [Signed by the twelve jurors.]

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The petition, the summons, the sheriff's return of service and the finding of the jury were filed in the circuit court for the county of Wayne, and that court entered an order confirming the finding. It does not appear that any notice of this proceeding in the circuit court was given to the parties interested in the estate of Joseph Ellair, but after the order of confirmation payment of the four hundred dollars was made to the widow, and she executed and delivered to the railroad company a receipt, of which a copy is given in the margin.[1] There is some evidence that no part of the four hundred dollars mentioned in the receipt was at the time paid over to the heirs, and whether the widow accounted for any part thereof in the settlement of her account as executrix was not shown.

This suit is ejectment, begun after the death of the widow in 1881. The Superior Court sustained the condemnation proceedings, and the defendant had judgment.

The proceedings were taken under section twelve of the charter of the railroad company (Sess. L. 1834, pp. 40, 44: 3 Terr. L. 1289), and the plaintiff insists that they were void for the following reasons:

1. Two of the owners were not named or in any way noticed in the proceedings.

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[1] DETROIT, September 10th, 1851.

Whereas, under the charter of the Detroit & Pontiac Railroad Company, and the acts amendatory thereto, a jury has assessed the damages for the use and occupation by said company of the rear part, being a strip of land thirty feet wide across the rear of lot number 11, south of Franklin street, on the Louis Moran farm, so called, in the city of Detroit, formerly and during his life-time the property of Joseph Ellair, now deceased, at the sum of four hundred dollars; and whereas, said inquisition has been confirmed by the circuit court for the county of Wayne, and said sum of money has been paid to me accordingly: I, Marie Ellair, widow and devisee and executrix of the will of said Joseph, do hereby acknowledge that I have received the said sum of money so assessed as aforesaid, from the said Detroit & Pontiac Railroad Company, to be disposed of according to the terms of the said will, and in full payment for the aforesaid use and occupation of said premises, and do hereby authorize and empower the said company to assume the possession thereof. Received also twenty-five dollars.

her
MARIE X ELLAIR. [L. S.]
mark.

In presence of
SAMUEL E PITTMAN.
The above is right.
J. A. VAN DYKE.

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2. There was no service of notice on any party concerned, except the owner of the life-estate.

3. No guardians ad litem were appointed for any of the infant owners.

4. No apportionment of the sum awarded was made between the widow and the several heirs. This, it is claimed, was essential.

5. All the money awarded was paid to the widow for her life-estate simply.

6. Under the Constitution of 1850, adopted before these proceedings were taken, it was required that the jury pass upon the necessity for the taking of the land; and no such question was submitted to them, nor was there any such finding.

The railroad company, on the other hand, contends that the confirmation of the inquisition by the circuit court is final and conclusive. It contains, it is said, all that the statute requires, and the court therefore had jurisdiction, and its proceedings are not to be attacked collaterally.

What is requisite to give the circuit court jurisdiction is not made very plain by the statute. All that it says upon the subject is that "said jury shall reduce their inquisition into writing, and shall sign and seal the same, and it shall then be sent to the clerk of the circuit court of said county, and by said clerk filed in his office, and shall be confirmed by said court at its next session, if no sufficient cause to the contrary is shown; and when confirmed the same shall be recorded by said clerk, at the expense of said company; but if set aside, said court may direct another inquisition to be taken in the manner above prescribed." Nothing is here said about notice to the parties; but if all parties concerned had notice of the proceedings taken before and by the jury, the statute itself would be notice that the inquisition would stand for confirmation at the next term of the circuit court. But obviously no one would be constructively notified of the proceedings in the circuit court unless he had had actual notice to appear at the inquisition; and in this case there was no attempt to show that any one but the widow had such notice. The question

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then is whether notice to her and payment to her of the damages assessed was sufficient.

The widow had a life-estate in the land under the will, and she was also executrix. By the statute then in force it was provided that "the executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased, and may receive the rents, issues and profits of the real estate, until the estate shall have been settled, or until delivered over by order of the probate court to the heirs or devisees, and shall keep in good tenantable repair all houses, buildings and fences thereon which are under his control." Rev. St. 1846, p. 288, § 7. The possession by the executrix under this statute would be in the right of and as representing the heirs or devisees, and she might undoubtedly bring or defend possessory suits without the heirs being joined. *Whitford v. Crooks* ante p. 261.

It does not appear in this case that the estate had been settled, and the contrary is inferable. It affirmatively appears that the executrix assumed to represent the estate in the proceedings; that able and reputable counsel appeared, not for her as life-tenant, but for the estate; and the sum awarded in gross must be deemed awarded to the estate. The receipt which was given for it was given as "widow and devisee and executrix," and clearly shows an understanding that the sum paid had been awarded, not merely for the interest of Mrs. Ellair, but for the interests she represented as executrix also. Upon this subject there is no room for doubt; and when Mr. Van Dyke certified that "this is right," he must be understood as approving of the appearance of the executrix for all concerned, and of her receipt for all of the compensation awarded.

It cannot be held, we think, that these proceedings were without jurisdiction. The estate was then in solido, and represented by the party who appeared. Other persons would have interests assigned to them in it when her administration was closed; but many things, in the meantime, might be done which would affect their interests, and possibly, in the course of administration, the lands might be con-

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verted into money, and exhausted in the payment of debts. The security of the heirs and devisees that their rights would be protected, must in such cases be found in the personal liability of the executrix and her sureties; and presumptively this is ample. That security the parties concerned had in this case.

The widow received the money for the estate, and it must be presumed she duly accounted for it. If she did, the heirs in receiving the moneys waived all errors. *Embury v. Conner* 3 N. Y. 511. The fact that none of the heirs received a part of the money as money specifically awarded to them is of no moment: if it was accounted for in the final settlement, and they received their shares in the estate at that time, it was the same, in legal effect, as if they had received their proportions of this specific money before. And it must be assumed, especially after this lapse of time, that due and full settlement was made. The youngest of the heirs appears to have been ten years of age in 1851, and must therefore have attained his majority in 1862, fully twenty years before this suit was instituted. If he had never been settled with for these moneys, he might at any time before his rights against her were barred by lapse of time, have called upon the executrix to account; and as the land had been fully paid for by the railroad company, this was what justice demanded, instead of the course now adopted. But, as has been said, the presumption must be that an accounting and settlement were had.

No error appears, and the judgment must be affirmed.

SHERWOOD and CHAMPLIN, JJ. concurred, CAMPBELL, J. not sitting.

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The Trustees of the First Congregational Church of the City of Ionia v. Andrew J. Webber.

Incorporation of religious societies.

A religious society that in good faith has exercised corporate powers for ten years must be treated as a legal incorporation even though the proceedings taken to incorporate it were in themselves fatally defective. How. Stat. § 4649.

Error to Ionia. (V. H. Smith, J.) June 24.—Sept. 23.

Assumpsit. Defendant brings error. Affirmed.

Mitchel, Bell & McGarry for appellant. The omission of such acts as are made necessary by statute for incorporation, is fatal to the right to act in that character, where its existence can be questioned: Ang. & Am. on Corp. § 83: *Mokelumne Hill Canal v. Woodbury* 14 Cal. 425; *Fire Department v. Kip* 10 Wend. 226; *Becht v. Harris* 4 Minn. 504; *St. Paul Division v. Brown* 9 Minn. 157; the franchises and privileges contemplated in How. Stat. § 4649 are those which an unincorporated collection of people cannot possess or enjoy: *Meth. Church of Newark v. Clark* 41 Mich. 737; the assumption of corporate capacity by a church, is not enough to establish a corporation de facto: *Van Buren v. Reformed Church* 62 Barb. 495.

Morse, Wilson & Trowbridge for appellee. When a corporation de facto is established, the question whether it is legally organized as a corporation cannot be enquired into collaterally: *Osborn v. People* 103 Ill. 228; *Alderman v. School Directors* 91 Ill. 179, 180; *Vernon v. Hills* 6 Cow. 23; *Wilcox v. Toledo & Ann Arbor R. R.* 43 Mich. 590; *Clement v. Everest* 29 Mich. 19.

Sherwood, J. This is an action of assumpsit brought to recover moneys alleged to belong to the plaintiff in its corporate capacity, and received by the defendant of an insurance company for the plaintiff as its treasurer.

The declaration is on the common counts, and describes the plaintiff as The Trustees of the First Congregational Society of

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the village, now city, of Ionia. The defendant filed a plea in abatement, denying the corporate existence of the plaintiff. To this plea a replication was filed, alleging in substance that under the name above given the plaintiff was a body corporate, legally organized, having been incorporated in 1868 under the laws as they then existed; that for more than ten years thereafter and up to the present time it exercised the functions of an incorporated religious society; and that the defendant, by reason of his being a member of the society, and accepting and holding the office of treasurer therein, and performing the duties thereof, and as such receiving the moneys declared for, is precluded and estopped from denying the corporate existence of the plaintiff.

Testimony was taken upon the issue thus presented, from which it appears, without contradiction, that on the 29th of May, 1868, the members of the Congregational church of the then village of Ionia met for the purpose of organizing and forming a religious society under the statute of 1855 (Sess. L. 1855, p. 313), and appointed a committee to draught articles of association, in pursuance of the requirements of the statute; that on the 6th of June following the meeting again met and adopted certain articles of organization reported by the committee; that on the 22d of June they again met and elected a full board of trustees, under and in pursuance of the articles adopted; that the certificate of the inspector of election was made, acknowledged and attached to the articles of association, and recorded by the county clerk, but the copy of the articles recorded was not signed by the persons adopting them; that after recording the certificate and articles of association the members of the society, supposing themselves to be organized, proceeded to exercise the functions of a regularly incorporated religious society, and continued to do so up to the time of the commencement of this suit in 1883; that the society held its annual and other meetings thereafter, and elected its trustees, who held their meetings; that the proceedings of both were properly recorded in the records of the church in every year except 1873 and 1876, from the time of its efforts to organize under the statute, in 1868;

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that the usual and ordinary business of such society was transacted at such meetings, such as calling a minister and fixing his salary, directing the trustees to select a site for and purchase a church for its meetings, increasing the pastor's salary, giving authority to trustees to sell a church lot, instructing trustees to perfect title by getting a new deed in place of one lost, to amend the articles of association, to procure insurance on church property, to elect a treasurer, to demand money claimed by the society, receiving deed of property bought and giving conveyances of property sold, taking the necessary action to defend against suit when brought, and other matters unnecessary to mention. It further in like manner appears that the defendant was a member of the society from the time of the first attempt to organize until suit brought, and much of the time held some official position; was both trustee and treasurer, and officially took part in some of the most important action taken by the society, such as purchasing, selling and conveying the real estate of the society.

The foregoing facts being clearly shown by the evidence, and not disputed on the trial of the issue raised under the plea in abatement, the circuit judge directed the jury to find against the plea, which they accordingly did. The plea being overruled, the court, in its discretion, then permitted the defendant to plead the general issue; and after the evidence was in (the amount claimed by plaintiff not being contested) the court again directed a verdict for the plaintiff for the sum of $1600 and interest from the date of demand made. The jury, having found the interest, rendered their verdict according to the direction of the court.

The first important question raised upon the record is, was the plaintiff, at the time this suit was brought, a legal corporation having the right to bring the same? I think it must be conceded that by the action taken in 1868, as evidenced by the records of plaintiff's transactions, it was not legally organized. The articles of association were not signed, and this was essential to the plaintiff's legal existence under the act of the Legislature. See Sess. L. 1855 Act 145, sec. 2. The record, however, shows an honest effort on the part of plaint-

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iff to organize thereunder, which resulted in the adoption of an imperfect organization, and action thereunder by the society for more than ten consecutive years in good faith, supposing the organization was a perfect one under the statute; and during all that period the society went on exercising, among others, the most important functions conferred by the statute, viz., buying and selling church property consisting of real estate, receiving and paying money therefor, and making and receiving deeds thereof; incurring and collecting debts, in the full belief by all parties that the plaintiff had a legal existence under the statute, and the right so to do, which seems never to have been doubted (although plaintiff had had some litigation) until one of its own members thought best to put it in issue in this suit.

Evidently in contemplation of such a state of things as exists in this case, the Legislature, in 1869, passed an act reading as follows: "That whenever any religious society or corporation shall have exercised the franchises and privileges of a corporation for the term of ten successive years, the same shall be presumed to have been legally organized in pursuance of the laws of this State." How. Stat. § 4649. This statute relieves the case of all embarrassment. We think there is no doubt of its application to the facts appearing upon this record.

Of course, very many of the objections taken to the testimony offered would have to prevail but for this statute. Under the theory of counsel for the defendant the testimony would be inadmissible. The organization having a legal existence at the time the right of action accrued, removes the objection made to the plaintiff's demand, and renders the consideration of the question of estoppel, raised by plaintiff's counsel, unnecessary.

We think the undisputed facts in the case fully warranted the rulings and directions of the circuit judge, and

The judgment must be affirmed with costs.

The other Justices concurred.

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The Van Buren Division of the Toledo & South Haven Railroad Company for the use of Rufus Tillor, William W. Vanderveer et al. v. Truman Lamphear and Loren Lamphear.

Contracts—Alteration in parties.

1. A railroad aid note was given whereby the makers, in consideration of the building of the Van Buren Division of the T. & S. H. Railroad, promised to pay to said railroad company, or order, $200 in thirty days after notice of its completion. When the note was given, the T. & S. H. Company was not in existence, and no company of that name was ever organized, but an independent corporation by the name of the Van Buren Division of the T. & S. H. Railroad Co. was afterward created, with a different purpose from that of the original undertaking. *Held*, that the promisee in the note was the T. & S. H. Railroad Co.; and that the Van Buren Division, as afterward organized, could not recover upon it without showing that the promisors had consented to the change of scheme, and declaring on the new agreement.
2. Parties to a contract are not liable after it has been altered, unless they have consented to the new subject matter in the same sense.
3. A contract cannot exist without competent parties to make it

Error to Van Buren. (Mills, J.) June 24.—Sept. 23.

Assumpsit. Defendants bring error. Reversed.

Edward Bacon for appellants.

O. W. Rowland and *Spafford Tryon* for appellee.

Champlin, J. The facts and circumstances antecedent to the date of the instrument declared on may be summarized as follows: In the winter of 1875-76 meetings had been held at Lawrence, in Van Buren county, at which a project was canvassed to obtain aid in the construction of a railroad from Toledo to South Haven, passing through Lawton, Paw Paw and Lawrence, to be called the Toledo & South Haven Railroad. At these

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meetings representations were made of the benefits to be derived from a connection with Toledo and the markets of that city and the benefits which would accrue to those residing in the vicinity of Lawrence by having a competing market with Detroit. The projectors of the road required that aid by way of donations should be given by residents in the vicinity of Lawrence to the amount of twenty thousand dollars, which it was represented should be expended in the construction of a division of the road between Lawrence and Paw Paw. Several persons living in and near Lawrence interested themselves in obtaining what they called "aid notes" to this enterprise, among whom was Edward H. Phelps, who called upon the defendants to give four hundred dollars. He talked with them about a railroad from Toledo to South Haven, and told them that prospectors had been over the route; that there would be a company organized to extend the road to Toledo some time; that they were talking about organizing a company south of Lawton. He testifies that he had given his own note to the Toledo & South Haven Railroad Company; that he represented to them that the aid he was soliciting from them would all be used between Lawrence and Paw Paw. The defendants refused to give aid to the amount of four hundred, but were willing to do so to the extent of two hundred dollars, and thereupon he drew up and they signed the following agreement, namely:

"$200. For and in consideration of the convenience of and benefit to be derived from the building of the Van Buren Division of the Toledo & South Haven Railroad through the village of Lawrence, Van Buren county, Michigan, I hereby promise to pay to said railroad company or order two hundred dollars, thirty days after notice of the completion of said railroad to and the establishing a depot at a point within one-half mile of the public square in said village of Lawrence, and connecting said point with some railroad now in running operation.

T. LAMPHEAR.
L. E. LAMPHEAR.

Dated at Lawrence, February 29, 1876."

—which they delivered to Mr. Phelps. At this time there was no such corporation organized as the Toledo & South

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Haven Railroad Company, and never has been since. Neither was there at that time any such corporation as the Van Buren Division of the Toledo & South Haven Railroad Company. The record shows that the articles of association of the plaintiff were not perfected by the making of the required affidavit until the 29th day of March, 1876, and were filed in the office of the Secretary of State on the 21st day of April, 1876. This corporation was organized to build a narrow-gauge road. The route of the road described in these articles commences at a point in the corporate village of Lawton, and thence runs in a north-westerly direction by the way of the villages of Paw Paw and Lawrence to a point on Black river in the village of Bangor in the county of Van Buren.

The declaration avers that the contract above set out was made with the plaintiff; and its right to recover depends upon the correctness of this averment. One of the essential elements of a legal contract is that there shall be parties capable of entering into it. The first question to be considered in this case is this: To whom was the promise made? What railroad company is referred to in the writing signed by the defendants? The language is: "I hereby promise to pay said railroad company or order." It must refer either to the Toledo & South Haven Railroad Company, or to the Van Buren Division of the Toledo & South Haven Railroad Company. To a person entirely unacquainted with the facts and circumstances attending the making of the paper it would appear, from the face of the writing, that there was a Toledo & South Haven Railroad Company, and that it was contemplated to build a division of such company's railroad, called the Van Buren Division, and that the convenience and benefit to be derived from the building of this division of the company's road constituted the admitted consideration for the promise, which was to be fulfilled thirty days after notice of the completion of said division to and establishing a depot at a point within one-half mile of the public square in the village of Lawrence, and connecting said point with some railroad in running operation at the time the promise

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was made. The promise, from a proper, obvious and ordinary construction of the language of the writing, was made to the Toledo & South Haven Railroad Company. The promisees, in order to avail themselves of aid promised, were to perform certain acts specified in the writing, namely, to complete the building of a division of its road, establish its depot and connect that point with some railroad then in operation. The facts and circumstances disclosed in the record do not alter the fair and legal import of the language used in the writing. They show that such a company was to be organized as the Toledo & South Haven Railroad Company, which should construct the road from the point named in the writing, and connect it with some road running to Toledo. Instead of organizing a Toledo & South Haven Railroad Company, a corporation was formed called the Van Buren Division of the Toledo & South Haven Railroad Company. How it could be a division of the Toledo & South Haven Railroad Company before such railroad company was formed, is difficult to perceive. The corporation, although called the Van Buren Division, is a complete and independent corporation, and has no connection with or relation to the unformed corporation called the Toledo & South Haven Railroad Company. It claims, moreover, that it is the payee or promisee named and intended in the writing declared upon in this case, and that having organized for the purpose of building the Van Buren Division of the Toledo & South Haven Railroad, and accepted the proposition therein made, and performed the conditions thereof, the contract became a binding obligation which it can enforce. I do not regard the writing signed by the defendants as an open offer or proposition to any person or corporation who would construct the Van Buren Division of the Toledo & South Haven Railroad through the village of Lawrence, but as a proposal directly to the Toledo & South Haven Railroad Company, which should thereafter be formed; and unless such a company should be thereafter formed, the promise could not be enforced for the want of a proper party to the contract.

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This subject was fully discussed in *Underwood v. Waldron* 12 Mich. 73, and principles laid down which must dispose of this case. It was there said that "There must therefore be not only a party promising, but a party to enforce the promise. * * * Until the *persons designated* to receive the money assume their duties—or, where *none are designated*, until some person incurs expense or liability in fair reliance on the subscriptions—the offer of the subscribers may properly be regarded as liable to withdrawal. In such case the question is not properly whether there is any consideration for the agreement, but whether there is any agreement at all." In *Stevens v. Corbitt* 33 Mich. 458, the promise was made to one H. H. Smith, and was afterwards properly assigned to the plaintiff. In that case it was said that "Where such a promise is made to some one necessarily connected with, or interested in the work being done, for the benefit of the company about to, or which may have undertaken the work, then, upon completion of the same, or upon the performance of the conditions upon which the promise was made, the liability of the promisor becomes complete." In *Michigan Midland & Canada Railroad Co. v. Bacon* 33 Mich. 466, the promise was made to the Michigan Midland Railroad Company, its successors or assigns. The Michigan Midland Railroad Company assigned the contract to the plaintiff, who completed the road. Marston, J. said: "From a reading of his agreement it would appear to have been a matter of small importance to him what corporation built the road and opened it for traffic, if it was only built and opened. It was the building and opening which was considered the essence of the agreement." These remarks are equally pertinent to the case under consideration, so far as the building of the road is concerned. It was a matter of no moment to defendants what company should actually complete the road mentioned in their writing. The benefits would accrue to them equally as well whether it was built by one or the other company. This relates to the consideration for the promise, but it does not by any means follow that any company which should build the road could maintain an action on the con-

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tract without showing that it was the party named in it, or derived its title through such party. *Tuttle v. Michigan Air Line R. R. Co.* 33 Mich. 247; *Swartwout v. Michigan Air Line R. R. Co.* 24 Mich. 389.

It was said in *Woods v. Ayres* 39 Mich. 350, that neither an express contract nor one by implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the mode of substantiation and not in the nature of the thing itself. To constitute either the one or the other the parties must occupy towards each other a contract status and there must be that connection, mutuality of intention, and interaction of parties, generally expressed though not very clearly, by the term "privity." The parties must be consenting bargainors, personally or by delegation, and their coming together in contract relation must be manifested by some intelligible conduct or sign. It is hardly necessary to say that without parties a contract cannot express any mutuality of will, or raise any contract relations. And that is precisely the difficulty here. The promise was made to the Toledo & South Haven Railroad Company, and there was no such party promisee in existence. And although the promise was made with the intention that such party would come into existence by proper organization for that purpose, and then be capable of passing upon the question of acceptance of the proposition, until that contingency should happen, the written proposition was of no force or effect as a legal obligation. Had the proposition been an open one, to any person or corporation who might thereafter build the Van Buren Division of the Toledo & South Haven Railroad, or had it been made to the corporation plaintiff by name, or had it been made to any person by designation for the benefit of the plaintiff, the case would have been different. In all such cases an acceptance by the party designated and performance makes a binding contract.

The contract declared on in this case being in writing, its legal construction was for the court. Its terms appear to us to be entirely unambiguous, and import a promise made to the Toledo & South Haven Railroad Company. The defend-

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ant was entitled to have the jury instructed as requested in his fifth, seventh, and fourth requests, to the effect that the plaintiff could not recover unless it was at the commencement of this suit the same corporation to which their promise was made, and to whom they intended it should be delivered, and that such promise, by the writing, was made to the Toledo & South Haven Railroad Company, and the jury should have been instructed, as requested, that the plaintiff was not entitled to recover.

If there could be any doubt as to the correctness of the construction which we have given to the writing under consideration, it would be absolved by the construction placed upon the instrument by the parties immediately interested in its enforcement soon after it was given, and by their acts in relation thereto. The record shows that the plaintiff corporation was fully organized on the 21st of April, 1876; that Mr. E. H. Phelps, who solicited and obtained the "aid note" from defendants, was a stockholder and subscriber to its articles of incorporation, as were also Mr. Free, Mr. Ihling and Mr. Adams; that as early as the 20th of March, 1876, the persons who were active in obtaining subscriptions to stock and aid notes, and among whom was Mr. Phelps, entered into a written pledge or agreement that, in case any of them should be elected director to represent the stock taken by the citizens of Lawrence in the Van Buren Division of the Toledo & South Haven Railroad, they would not use any part of said stock until the building of said road between Lawton and the Michigan Southern Railroad became an established fact, by getting sufficient subscriptions to grade and tie said road, and making arrangements with responsible parties to put the iron and rolling stock on that portion of said road. It also appears that nothing further was done than to organize the company and obtain subscriptions, and that they were awaiting some action to be taken between Lawton and the Michigan Southern Railroad; that the people in that locality did nothing, and seemed inclined to abandon the project; that in 1877 certain parties connected with the plaintiff corporation then proposed a new scheme, which was

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to construct a railroad from Lawrence to Paw Paw and utilize the road then built from that point to Lawton by narrowing up the track, or putting down a third rail and thus obtain a railroad connection with the Michigan Central Railroad. Consequently they called a meeting of the stockholders and subscribers at Lawrence, and laid the scheme before them and asked their consent to the change. At this meeting Mr. Free, Mr. Ihling and Mr. Adams were present, and Mr. Free stated the object of the meeting, which was to build the line from Lawton to Lawrence, and he requested aid from the citizens of Lawrence to construct it to Paw Paw; and when asked why they did not use or rely upon the aid notes already given, he remarked that "this is a different project from what those were given for, and that they did not propose to buy any lawsuits." A vote was taken and the change agreed to, with but one dissenting voice. Dr. Haskins, a witness for plaintiff, testified that he attended this meeting, and that the proposition was to decide whether they would go on and build this division from Lawrence to Paw Paw before the others had completed their organization, or raise their subscription to build the other portion between Lawrence and Bangor, or further south. There can be no doubt that those subscribers who assented to this project, whether at that meeting or at any other time, would be bound by the new agreement, in which case it would be necessary to declare upon the new agreement. The parties must assent to the same subject-matter in the same sense. *Hazard v. New England Ins. Co.* 1 Sumn. 218; *Hartford & N. H. R. R. Co. v. Jackson* 24 Conn. 517. The defendants did not attend the meetings, and their evidence is that they never assented to the change, and there is no testimony tending to prove that they ever did assent thereto. Upon this point there was no conflict of testimony. The burden of proof was upon the plaintiff, and it failed to show that the defendants consented to the change of project.

The judgment is reversed with costs of both courts and a new trial granted.

The other Justices concurred.

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THOMAS BOYD v. MERRITT E. CONKLIN ET AL.

Judicial knowledge—Flooding lands.

1. Courts will take notice of the recital in public statutes of the time when a turnpike was laid out and built by the general government, and of the fact that it afterwards became subject to State authority and went into the charge of the ordinary town officers.
2. The maxim "Sic utere tuo alienum non lædas," applies to adjoining owners of land, each of whom must respect the valuable rights which accrue to the other from the relative situation of their lands, *e. g.*, in respect to the flow of surface water from one upon the other.
3. A rural land owner has no right to put up such artificial barriers as will flood his neighbor's land with water that would otherwise escape over his own, for the mere purpose of reclaiming the bed of a pond that has always been on his premises, and of getting rid of the inflow.

Error to Lenawee. (Howell, J.) June 24.—Sept. 23.

TRESPASS. Plaintiff brings error. Affirmed.

A. L. Millard and *Bean & Underwood* for appellant. No one can insist that surface water gathering on land shall be permitted to run into or through the lands of an adjoining proprietor: *Luther v. Winnisimmet* 9 Cush. 171; *Bates v. Smith* 100 Mass. 181; *Curtiss v. Ayrault* 3 Hun 487; *Dickinson v. Worcester* 7 Allen 19; *Goodale v. Tuttle* 29 N. Y. 459; *Flagg v. Worcester* 13 Gray 601: Cooley on Torts 575; *Barkley v. Wilcox* 86 N. Y. 140; *Cairo & Vicennes R. R. v. Stevens* 73 Ind. 278; the owner of land adjoining a highway can build an embankment on his own land to prevent the surface water from flooding it from the highway, even though it injures the highway: *Franklin v. Fisk* 13 Allen 211; *Murphy v. Kelley* 68 Me. 521; the length of time surface water has been accustomed to run in a particular channel makes no difference: *Pettigrew v. Evansville* 25 Wis. 223, 228; *Parks v. Newburyport* 10 Gray 28; *Hoyt v. Hudson* 27 Wis. 656; a land-owner may turn back the overflow of a stream as well as surface water produced by rain or snow: *Taylor v. Fickas* 64 Ind. 167; neither highway commissioner nor township board have any authority (with certain excep-

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tions not applying to this case), outside the highway, and are trespassers if they interfere with property beyond its limits: *Ashley v. Port Huron* 35 Mich. 296; *Elder v. Bemis* 2 Met. 599.

C. A. Stacy for appellee. To destroy, stop up or divert the course of an ancient highway is a nuisance at common law: Angel on Highways § 224; *Rex v. Ward & Lynn* Cro. Car. 266; *Rex v. Flecknow* 1 Burr. 465; *Weathered v. Bray* 7 Ind. 706; any one may abate of his own motion such a public nuisance: *Wetmore v. Tracy* 14 Wend. 250; *Hart v. Albany* 9 Wend. 571: 3 Paige 213; Angel on Water-courses §§ 390, 392; *Arundel v. M'Culloch* 10 Mass. 71; *Pierce v. Dart* 7 Cow. 609; *People v. Carpenter* 1 Mich. 289; *Carpenter v. Mann* 17 Wis. 155; a superior land-owner can improve his lands by throwing increased waters upon his inferior through the natural and customary channels: *Kauffman v. Griesemer* 26 Penn. St. 408; *Porter v. Durham* 74 N. C. 769; *Martin v. Riddle* 26 Penn. St. 415; *Miller v. Lanbach* 47 Penn. St. 154; *Gillham v. Madison R. R. Co.* 49 Ill. 484; *Gormley v. Sanford* 52 Ill. 160; *Ogburn v. Connor* 46 Cal. 346: 13 Am. Rep. 213; *Acton Blundell* 12 M. & W. 324; *Butler v. Peck* 16 Ohio St. 334; *Tootle v. Clifton* 22 Ohio St. 247; *Mason v. Hill* 5 B. & Ad. 1; *Bellows v. Sackett* 15 Barb. 96; *Nevins v. Peoria* 41 Ill. 562; *Rudd v. Williams* 43 Ill. 385; *Laumier v. Francis* 23 Mo. 181; *Livingston v. McDonald* 21 Iowa 160; *Hooper v. Wilkinson* 15 La. Ann. 497; *McCormick v. Kansas City R. R. Co.* 70 Mo. 357; *Shane v. Kansas City R. R. Co.* 71 Mo. 237; *Earl v. DeHart* 12 N. J. Eq. 283; Washburn on Easements 355.

Campbell, J. Boyd sued defendants for removing part of a dam which he had built across the outlet which drained an adjoining highway and higher lands adjacent. Lorenzo D. Dewey owned a farm running north of the highway about half a mile, and a swale ran through this land from north to south which crossed the road through a culvert from which the water flowed across Boyd's farm to a pond on his land which has no surface outlet. The swale is crossed by an old beaver dam near its north end, and a creek called Evans' creek, a little to the north of it, sometimes overflows so that the water runs over this beaver dam into the swale. The swale carries down all the surface water on Dewey's land, and there

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was testimony tending to show that it was partly fed by springs, although this was disputed. Both farms are enclosed by a ridge which prevents any water passing from Dewey's land from escaping except through the swale and into the pond, and there is no other way of draining the highway. The soil is clay except to the south and east of the pond where it is gravelly, and where there is some escape of water by percolation, and possibly by a subterranean outlet. Both farms seem to have been in private hands for above fifty years. The road appears by the testimony to be the La Plaisance Bay turnpike, which was, as we are judicially informed by public statute, laid out in 1832, and built by the United States government, and subsequently became subject to State authority and is now in charge of the ordinary town authorities. Just north of the road (which runs east and west on the section line between sections 32 and 29, in township 5 south of range 4 east) the swale widens on Dewey's land into a small pond. The pond on Boyd's land is never dry, and before he built the dam contained usually from six to eight acres, of which a space of several acres became dried by means of the exclusion of the water which came down from the lands above, which had no other escape. The dam was a solid structure twelve feet thick at the base and seven on the top, about a hundred paces long, and higher than the highest part of the culvert or highway. Its effect was to submerge the road, and also to throw the water all back over the highway and upon Dewey, where it had no escape but by evaporation.

Boyd purchased the farm which contains a little over ninety acres, in 1872, at which time there was no obstruction to the flowage. He first built the dam in 1877, and it was removed so as to give room for the water in 1878 by the highway commissioner. Being rebuilt, it was removed in 1879 by defendants, under the direction of the local authorities, Conklin himself being commissioner and acting in pursuance of their instructions.

The case, as it is now before us, presents no complications. The dam was built for the sole and express purpose of shut-

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ting out the water, which had its only outlet through the swale and over Boyd's land, and this was its original and natural outlet. It was not artificial but had always existed since the country was known; and the existence of a beaver dam makes it not unlikely that it was once a running stream. Whether its waters are to any extent from springs or not, they include the whole surface drainage, and are not confined to passing storms. There is some testimony of occasional attempts by the lower owners to obstruct the water, but no evidence of acquiescence, and very little, if any, of submission by the highway authorities to such obstructions.

If this had been an artificial drainage, the long existence of the road, which could not be kept in repair without drainage, and the undisputed fact that a regular culvert has existed at least since 1845, and that no other drainage was possible, would in our opinion put plaintiff to very strong proof to overthrow the presumption of right. The court below gave plaintiff the benefit of that analogy, and going very far in the endeavor to avoid giving occasion for cavil, limited defendant's justification to a substantially uninterrupted enjoyment of the drainage for twenty years without substantial objection to the public or highway authorities. But plaintiff insists that his right to intercept surface water cannot be cut off in that way, and that except in case of living waters in a defined and regular channel, there is no such obstacle, or none without such an undisputed prescriptive right as would be equivalent to a grant.

On the argument the whole subject was discussed with much ability. It is not necessary, however, to consider any more of the legal theories than such as have some application on the facts.

The real question here was whether one landowner can at his pleasure erect such barriers as will flood his neighbor's land with water that otherwise would escape over his own, in order to partially or wholly reclaim the bed of a pond which has always existed there, and get rid of the inflow. In its natural condition neither the highway nor the upper

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lands would be drowned. The effect of the dam is to cover portions of them with water that cannot escape.

It was urged strenuously on plaintiff's behalf that there is a radical difference between the common and the civil law upon the subject of the relations of upper and lower estates as to water easements and servitudes, and that at common law the latter owes no service to the former in regard to the flow of surface water. As we are not expected officially to be experts in the civil law, we shall not attempt to discuss that department of jurisprudence as a separate subject. But it so happens that from the time of Bracton down attention has been frequently called by the common-law courts to the fact that the whole subject of rights in water has been defined by the civil-law writers in terms which substantially agree with the recognized rules of the common law, and that they agree very closely, not necessarily because one has been borrowed from the other, but rather because both are naturally drawn from the general usages and necessities of mankind. All of the considerations which belong to the present case depend on the reciprocal action on both upper and lower proprietors of the maxim that every man, in the use of his own property, must avoid injuring his neighbor's property as far as possible. And while the cases cited on the hearing show that courts have sometimes indulged in sweeping language that taken independently would lead to remarkable results, the facts on which the apparently conflicting rulings rest greatly narrow their substantial repugnance. There are, it must be admitted, decisions that cannot possibly be harmonized. But their number and their force do not equal their apparent importance. And there is no subject on which local usages have had so much weight in shaping the local common law as the incidents of real estate. There are parts of the Union where the land laws have always differed from the common law of other states, while the law relating to water has been laid down in a large part of the United States in a uniform manner, without reference to their ancient condition as French, Spanish or English colonies. The civil-law definitions, or what are supposed to be such, are quoted

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as often under the one class of antecedents as under the other.

The chief differences pointed out on the argument, as important in weighing decisions as furnishing precedents, related to distinctions between living streams in a natural flow, and water of a different character in artificial escapes or in surface descents, — to distinctions between urban and rural servitudes, — and to the purposes for which dams or other interruptions are made.

It is not disputed that perennial flowing streams of living water impose similar duties and confer similar rights on all riparian proprietors under all systems of jurisprudence. It is not disputed that under what is claimed to have been the civil-law rule, the rural proprietor of lower lands was required to receive the water flow of surface water from the upper lands coming in substantially its natural amount and condition. Beyond this we cannot harmonize much of the contention of counsel, and must dispose of the case as it appears to us.

A number of the most striking cases cited by plaintiff's counsel in support of his appeal, as laying down the broadest doctrine, and as relied upon in a good share of his other citations, were cases where the lands were in towns and cities, and the erections or acts in litigation referred to the uses of that class of property. And in relying on these it was claimed that there was no substantial foundation for any distinction between urban and rural property.

There is no question but that such a distinction is recognized in the civil-law authorities referred to on the argument, as well as in several of the cases cited. The distinction is one of substance and not arbitrary. As already suggested, the adjoining owners owe mutual duties,—the one to receive the natural flow, and the other not to injuriously change its conditions. It is obvious that the laying out of town streets and the multiplication of buildings cannot avoid making serious changes in the surface of the ground and in the condition of surface water. Grades must usually be established for streets and sidewalks, and pavements and other surface

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changes are usual, in addition to the walls of buildings which, with their embankments, must obstruct or change the drainage. It is almost universally expected and provided that sewerage and drainage shall be regulated by some municipal standard. There cannot be towns without changing the face of the land materially. And where the same rule has been applied to towns as to the country, it has in some cases at least, been done expressly, because in the circumstances of the record the particular land in question had remained under rural conditions. If—as seems to be true—some decisions ignore the distinction, they depart from the old rule, and cannot be maintained as harmonious with the general line of authority, unless on special facts which do not justify their broad dicta.

The Massachusetts cases lay down so broadly the right of the lower proprietor to cut off the water flowing down on him, that whatever distinctions may be found in their facts, the court evidently meant to disregard them. The Wisconsin cases perhaps go about as far, and the Indiana rule is stated in similar terms. It can hardly be said that there is any fixed New York rule which would apply to such a case as the present. In the case of *Barkley v. Wilcox* 86 N. Y. 140, where the interference with the water was by building and banking up a house near a street, the facts did not call for any very general discussion, and the court, while expressing a preference for the views of the Massachusetts courts over the rule in Pennsylvania and other states to the contrary, saw the necessity of caution in adopting those views too universally, and left the door open to deal with cases like this on their own footing. In *Bowlsby v. Speer* 2 Vroom (N. J.) 351, the facts and the decision were like those in *Barkley v. Wilcox*, but can hardly be said to disturb the earlier case of *Earl v. De Hart* 1 Beasl. Ch. 280, where the civil-law principle was treated as in some cases furnishing a proper rule for town property which was not so situated as to require a different treatment.

Mr. Washburn, in his treatise on Easements (p. 355), indicates that the Massachusetts rule is not sustained by the weight

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of American authority, and that the rule known as the civil-law rule has been more generally accepted. He cites most of the authorities brought to our attention on the argument, and they unquestionably sustain the existence of duties between the respective land-owners to do no harm to each other against the natural servitude.

Much of the discussion found in the cases referred to turns, not on the right of the upper owner to have egress for his water, but upon the right of the lower owner to have the water come down. In the present case, Boyd does not seem to desire this supply. But it is quite supposable that, if this pond were not entirely on his premises, it might be of some importance to the neighboring land that it should not be diminished or destroyed.

It is not necessary on this record to determine how far defendants could themselves have shut off the supply, because it is evidently not for their interest to do so. But there is no lack of cases which hold that rights may exist in a flow of water which is not a natural living stream. And while here, as in other cases, the rights of parties must depend somewhat on the circumstances and surroundings, the general principle underlying all the cases is that the upper and lower owners must respect any valuable rights which accrue to either from the position of their lands. The narrow definition of water-courses as natural living streams, which appears in a few cases in the United States, is not an ancient or universal definition. On the contrary, water running in a natural or artificial bed is very frequently, if not generally, so regarded. But names are of small importance, inasmuch as the only consideration that need be looked at is the character and surroundings of the flowage. The following authorities recognize valuable rights in water, and some of them are spoken of expressly as water-courses, which are entirely distinct from natural living streams. Woolrych on Waters 3, 146–7; *Wright v. Williams* 1 M. & W. 77; *Rawstron v. Taylor* 11 Exch. 369; *Broadbent v. Ramsbotham* 11 Exch. 602; *Beeston v. Weale* 5 El. & Bl. 986; *Ivimey v. Stocker* L. R. 1 Ch. App. 396; *Watts v. Kelson* L. R. 6 Ch. App. 166;

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Nuttall v. Bracewell L. R. 2 Exch. 1; *Holker v. Poritt* L. R. 8 Exch. 107; *Taylor v. Corp. of St. Helen's* L. R. 6 Ch. Div. 264; *Magor v. Chadwick* 11 Ad. & E. 571; *Chadwick v. Marsden* L. R. 2 Exch. 284.

Upon such questions as are raised on this record there is, except in the Massachusetts doctrine and the cases which have followed it, very little conflict of opinion. Whatever may be the rights of adjoining proprietors as to the use and diversion of water, there is no right in any one, by raising artificial obstructions, to flood his neighbors' lands, by stopping the escape of water that cannot escape otherwise. Some cases have intimated that there might be larger rights of obstruction where the particular drainage was not necessary. But actual mischief done as a natural and necessary consequence of such erections is almost universally treated as an actionable nuisance. *Lawrence v. G. W. R. Co.* 16 Q. B. 643; *Rylands v. Fletcher* L. R. 3 H. L. 330; *Tootle v. Clifton* 22 Ohio St. 247: Wood on Nuisances § 386; *Hurdman v. N. E. Rw. Co.* L. R. 3 C. P. Div. 168; *Whalley v. Lancashire & Yorkshire Ry. Co.* L. R. 13 Q. B. Div. 131; summarized in 30 Alb. L. J. 3; *Broder v. Saillard* L. R. 2 Ch. Div. 692; *Gillham v. Madison Ry. Co.* 49 Ill. 484; *Gormley v. Sanford* 52 Ill. 158; *Ogburn v. Connor* 46 Cal. 346; *Butler v. Peck* 16 Ohio St. 334; *Nevins v. City of Peoria* 41 Ill. 502; *Livingston v. McDonald* 21 Iowa 160; *Hooper v. Wilkinson* 15 La. Ann. 497; *McCormick v. Kansas City R. R.* 70 Mo. 359; *Shane v. Kansas City Ry.* 71 Mo. 237.

As previously suggested, the rights of upper and lower owners are not treated by the common-law authorities as peculiar to either common or civil law, but as natural incidents to the land, which are and must be analogous as governed by universal jurisprudence, except where specially modified. The English courts have never hesitated to cite the civilians on such questions, and they have decided cases arising out of England without attempting to inquire into any local law as the basis of decision. Thus, in the East Indian case of *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk*

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L. R. 4 App. Cas. H. of L. 121, the rights of the parties were dealt with just as if they had arisen in England, although the uses of tanks and reservoirs in India must in all probability have grown into very ancient customs. In *Smith v. Kenrick* 7 C. B. 715, the Digest was cited as authority. In *Dickinson v. Grand Junction Canal Co* 7 Exch. 282, and in *Embrey v. Owen* 4 Eng. L. & Eq. 466, it is stated that these various rights are not to be regarded as based on any presumption of grants, but as incidents to property jure naturæ. Bracton is cited in Wood on Nuisances § 386, as coinciding with the civil-law rule. While he has been regarded as drawing too much from the Roman law in some other matters, no one has doubted that he laid down the common law correctly on this. Britton lays it down very clearly that no one can drown his neighbor's land, by erections on his own soil. "Appurtenances," fol. 140. The civil-law rule was recognized and adopted in the customary as well as in the written law in parts of France, and in Canada and Scotland; and the Roman law in all these regions was modified by local usage, and in many things repudiated. In Basuage's Commentary on the Custom of Normandy it is not treated as a civil-law rule, but as a law of nature. 2 Basuage, 565. In *Frechette v. La Compagnie Manufacturiere De St. Hyacinthe* L. R. 9 App. Cas. H. of L. 170, the Lower Canada Code is quoted, which seems to be a substantial if not a literal transcript of section 640 of the French Civil Code, and regulates the rights of both classes of owners, forbidding the lower owner from hindering the escape of water by dikes, and forbidding the upper owner from aggravating the flow to the injury of the lower estate. In discussing this clause, a learned writer on the law of property, Charles Comte, speaks of the term "servitude," which strictly denotes a diminution of rights, as an unfortunate and improper phrase to apply to these reciprocal duties. "It is simply a means of preventing usurpation, and of securing to each that which belongs to him." While Erskine in his "Principles of the Law of Scotland," uses the term "servitude" as including the rights in question, he speaks of them as natural, as contradistinguished from legal

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servitudes. Book 2, title 9. Domat refers to them in the same way, dividing servitudes into those which are natural, and those which do not rest on natural right. Book 1, tit. 12, § 5. And this is further illustrated by his collection of excerpts from the Roman law. 4 Domat 423.

There seems to be no reason for attempting to draw distinctions between the civil and the common law on this subject. The authorities recognize the principles as in no sense conventional, or derived from any school of jurisprudence, but as resting on the immunity of one man's property from injury by another in violation of natural justice and in disregard of the relative conditions arising from its position. Each may do in using his own what is consistent with the fair interests of the other.

The escape of water in the present case is natural and is necessary, and there was no right to prevent it by such a dam as defendants broke through. The charge given was at least as liberal as plaintiff had a right to ask.

The judgment should be affirmed.

CHAMPLIN and SHERWOOD, JJ. concurred. COOLEY, C. J. did not sit.

MARIAM R. MORFORD v. CHARLES DIEFFENBACKER.

Amendment of declaration as to plaintiff—Presumption of probate jurisdiction—Guardian's petition for probate—Fraud—Conditional devise for support.

1. A declaration in the name of a guardian was amended after plea by making the ward the plaintiff, suing by her next friend, who was the guardian aforesaid. The issue was in no way changed, however. *Held*, that the amendment was allowable; and it was not material that no opportunity was given to plead anew if leave was not asked or reason apparent therefor.

2. The probate courts of Michigan have, in probate matters, a general, and, for the most part, exclusive jurisdiction; and their orders can not be attacked collaterally upon any assumption that evidence was

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wanting to support jurisdictional allegations; their action, when properly invoked, is presumed to be rightful.

3. A guardian has such an interest as will entitle him to petition for the probate of a will in his ward's favor; and the probate, if allowed, cannot be collaterally assailed for the want of a showing that he had proved the allegations on which his right to petition was based.

4. A devise of property for the devisee's natural life, with authority to dispose of enough for his support, if the use of it should be insufficient, gives only a life estate with conditional power of disposal. And so long as any money bequeathed by the will is available for the devisee's support, the real property cannot be sold for that purpose.

5. A sale for the nominal purpose of raising money but for a grossly inadequate sum and to a person who has no means, is apparently fraudulent.

6. A fund provided for the "support" of a person cannot be appropriated to the building or completion of a dwelling place.

Error to Lenawee (Steere, J.) June 24.—Sept. 23.

EJECTMENT. Defendant brings error. Affirmed.

Westerman & Westerman and *Millard, Weaver & Weaver* for appellant.

Bean & Underwood for appellee.

COOLEY, C. J. Ejectment. The suit was begun by the filing of a declaration in the name of John Armstrong as guardian of Mariam R. Morford, an infant, as plaintiff, and counting on the seizin of said plaintiff "as such guardian and in the right of said Mariam Morford," in the west half of the southwest quarter of the southwest quarter of section five, and the west twenty-five acres of the west half of the northwest quarter of section eight in township six south of range three east. There was also a count in which an undivided half of the west fifty acres of the west half of the northwest quarter of section eight was claimed.

After the defendant had appeared and filed a plea to the merits, the infant, by her guardian, presented a petition in which it was stated that she was nine years of age; that she was entitled to recover certain real estate described in the declaration; and she prayed that Armstrong, her guardian,

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might be appointed her next friend to appear for her in said suit, and that the declaration in the cause might be amended by striking out whenever occurs the name of the plaintiff John Armstrong as guardian of Mariam R. Morford, and substituting in place thereof Mariam R. Morford, an infant under the age of twenty-one years, by John Armstrong, her next friend. This motion was opposed by defendant, but was granted, and it was ordered that the cause proceed the same as though it had been commenced in the name of Mariam R. Morford, by John Armstrong, her next friend.

When the cause came on for trial the defendant objected to the trial on the grounds:

1. That there was no issue formed between the parties therein.

2. That the court had no jurisdiction to try the same, there being no proceedings by which the defendant had been legally summoned or brought into court to answer this plaintiff.

3. That no plea had been filed by the defendant to the declaration of this plaintiff.

This objection merely raised the question of the power of the court to allow the amendment which had been ordered. The court overruled it, and directed the trial to proceed.

In tracing title in the plaintiff it became necessary to show the probate in Michigan of the will of William Dieffenbacker, formerly of the county of Livingston in the state of New York, which bore date March 12, 1868, and was probated in the surrogate's court of that county in the following May. For this purpose the records of the probate court of Lenawee county were put in evidence, from which it appeared that on January 16, 1882, John Armstrong presented to that court a petition reciting the death of said William Dieffenbacker and the probate of his will in the state of New York; that at the time of his death he was seized of real estate situate in said county of Lenawee, which by the will was devised to Henry Dieffenbacker and Elizabeth Dieffenbacker for the term of their natural lives, and at their deaths to the children of said Henry in fee; that said Henry had died leaving two children, Elva and Charles; that said Elva had since deceased,

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leaving a last will, by which an interest in said real estate was devised to Mariam R. Morford, an infant, of whom petitioner was guardian. And the petition prayed that said will of William Dieffenbacker be admitted to probate in Lenawee county, and letters for the execution of the same granted.

The petition was not verified by oath, and the record shows no proof made of Armstrong's guardianship, but an order was made for hearing upon it, and notice of hearing was duly published. On the day appointed for hearing, the will with the New York probate was presented, and no objection being made, an order admitting it to probate in Lenawee county was duly entered.

When these proceedings were offered in evidence on this trial, the defendant objected that they were invalid because it did not appear that John Armstrong was in any manner interested in the estate of William Dieffenbacker, or had any right to move in the probate of the will. He stated in his petition that he was guardian to Mariam R. Morford, but it was claimed he made no proof of the fact either at the time of presenting the petition or on the day of hearing. He did not even state where he was appointed such guardian. The court overruled this objection, and the defendant excepted.

The will of Elva Dieffenbacker bears date February 21, 1880, and its bequests are in the following words:

First. I desire that all my just debts and funeral expenses be paid by my executor out of my estate.

Second. I hereby give and devise unto my cousin, Mariam R. Morford, my organ now in my possession, the same being the only organ now in my possession.

Third. I hereby give and devise to my mother, Elizabeth Dieffenbacker, all the rest, residue and remainder of my property, of whatever nature, which I shall die seized of, for and during her natural life; and in case the use of said property shall be insufficient for her support, then and in such case I hereby authorize her to dispose of such of said property and such amounts thereof as shall be sufficient for her support; and whatever shall remain at her death I hereby give, devise and bequeath unto my said cousin, Mariam R. Morford and to her and her heirs forever.

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The facts in the case, and the conclusions of law thereon, are found by the circuit judge as follows:

FINDINGS OF FACTS.

First. William Dieffenbacker, the grandfather of the above-named defendant, died at Geneseo, Livingston county, state of New York, on the 11th day of May, A. D. 1868, seized in fee-simple of the west half of the southwest quarter of section 5, and the west 50 acres of the west half of northwest quarter of section 8, all in town 6 south, of range 3 east, in the township of Adrian, county of Lenawee and state of Michigan, which above-described property is the subject-matter of this suit.

Second. That said William Dieffenbacker died testate, and his last will and testament, after being first proved and allowed by the surrogate court of the said county of Livingston, N. Y., was proved as a foreign will and admitted to probate by the probate court of Lenawee county, State of Michigan, upon the petition of John Armstrong, mentioned as the next friend of the plaintiff in the above-entitled cause, as more fully and at large appears by the files and records of said probate court in the matter of the estate of said William Dieffenbacker, which said files and records are in evidence in this cause, and are hereby made a part of these findings. By the terms of which last will and testament the said William Dieffenbacker gave and bequeathed to his son, Henry Dieffenbacker, and wife Elizabeth, the use, control and interest of the land above described, during their life-time, or the life-time of either of them; and at their death, or the death of both said Henry and Elizabeth, said land was to go to the children of said Henry Dieffenbacker, or their heirs, forever.

Third. That the children of said Henry and Elizabeth Dieffenbacker were Elva E. Dieffenbacker and Charles Dieffenbacker, the defendant in the above-entitled cause.

Fourth. That the said Henry and Elizabeth Dieffenbacker held the possession of said lands and premises under and by virtue of said will, and occupied the same during their respective lives, residing in what was designated as the old house, on the east half of the 50 acres before described; and, after the death of said Henry, the said Elva and her mother Elizabeth continued to live in and occupy said old house, in which house the said Elva died.

Fifth. That the said Henry died about the year A. D. 1870. The said Elva E. died May 4th, 1880, and the said

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Elizabeth died August 20th, 1881, or about fifteen months after the death of said Elva.

Sixth. That subsequent to the death of said Henry, and on July 22d, 1879, the said defendant Charles Dieffenbacker and his wife conveyed, by quitclaim deed, to the said Elva Dieffenbacker all their interest in the 20 acres of said property lying north of the highway, described as west half of south-west quarter of south-west quarter section 5, town 6 south of range 3 east, and on the same day the said Elizabeth Dieffenbacker also conveyed to said Elva, by her quitclaim deed, all her life-interest in said 20 acres.

Seventh. That the said Elva died seized, in fee-simple absolute, of the above-described 20 acres, and of an undivided one-half (½) interest in the 50 acres before described, her brother Charles, the above-named defendant, being seized of the other undivided one-half of said 50 acres, the whole being subject to the life-interest of the said Elizabeth Dieffenbacker, their mother.

Eighth. That the said Elva E. Dieffenbacker died on May 4th, 1880, as aforesaid, testate, leaving a last will and testament, in which she appointed Linus Van Deusen her executor, he accepting and entering upon that trust; which said last will was admitted to probate in the probate court of Lenawee county, Michigan, on the 21st day of June, A. D. 1880, as more fully appears by the files and records of said probate court in the matter of the estate of Elva Dieffenbacker, deceased (which said files and records are in evidence in this cause and are hereby made a part of these findings); by the terms of which said will, after providing for the payment of all her just debts and funeral expenses by her executor, and after giving her organ to her cousin, Mariam R. Morford, the plaintiff herein, she gave her mother a life estate in her property, with a contingent power of sale, as follows: "I give and devise to my mother, Elizabeth Dieffenbacker, all the rest, residue and remainder of my property of which I shall die seized, for and during her natural life. And in case the use of said property shall be insufficient for her support, then and in such case I hereby authorize her to dispose of such of said property, and such amounts thereof, as shall be sufficient for her support, and what shall remain at her death I hereby give, devise and bequeath to my said cousin, Mariam R. Morford, and to her heirs forever."

Ninth. That about two years before her death, the said Elva received from an eastern relative a legacy amounting to over $3000, and from that time to her death supported her

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mother, Elizabeth, for the most part, providing her with an abundance of clothing and other comforts, and had contracted in writing for the construction of a new house on the 20 acres aforesaid, which she owned in fee-simple, at an expense of $1100, upon which she had paid $850; which said house was completed under said contract after her death, and into which said Elizabeth Dieffenbacker moved in July, 1880, with Mariam R. Morford, the plaintiff herein, and in which the said Elizabeth continued to reside until her death on August 2d, 1881.

Tenth. That on December 21st, 1880, and about seven and a half months after the death of the said Elva, the said Elizabeth Dieffenbacker gave to her son, Charles Dieffenbacker, the defendant herein, a quitclaim deed of the west twenty-five acres of the fifty acres before described, the actual consideration therefor being $250, which deed is in evidence in this case, is marked Defendant's Exhibit A, and is hereby made a part of these findings.

Eleventh. That at the time of the giving of said deed there was on hand of the personal property of the estate of said Elva a horse and buggy, two cows, two steers, wheat, hay, corn, potatoes and other chattels of several hundred dollars value. That said Elizabeth had also received from the estate of said Elva the sum of $385 in cash, by virtue of a certificate of deposit of money in bank payable to said Elva, upon which certificate the said Elizabeth had indorsed the said Elva's name, appropriating the same, and making no account thereof to the estate of said Elva, paying, however, several debts of the said Elva's and of her own, including the $250 balance upon the contract for the new house, none of which debts were proved or allowed by the probate court as debts or claims in the matter of the estate of said Elva.

Twelfth. That at the time of giving the said deed of the west twenty-five acres aforesaid there was in fact no necessity of the sale of any portion of the estate of said Elva for the support of said Elizabeth, but that the money she had received and use of the said property were amply sufficient therefor.

Thirteenth. That on June 4th, 1881, thirteen months after the death of said Elva, and about one and a half months before her own death, the said Elizabeth conveyed by a warranty deed, for the expressed consideration of $1500, to the said Charles, her son, defendant herein, the twenty acres north of the highway, as heretofore described, and upon which she then lived, it being stated in the deed aforesaid that the sale was necessary for her support; the said Charles paying

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her upon the same the sum of $700, that being the amount for which he was able to mortgage said property, he verbally agreeing, as part of the consideration, to support her for the balance of her life; and after mortgaging said property giving her a life-lease of the same, which said deed is in evidence in this cause, is marked Defendant's Exhibit B, and is hereby made a part of these findings.

Fourteenth. That the said Elizabeth, at the time of the death of said Elva, was supplied with an abundance of clothing and bought but little thereafter. That she had lived for many years on a farm, was a woman of frugal habits and accustomed to a simple mode of life, in keeping with her surroundings. That she had for several years been affected with pulmonary consumption, and died of that disease; that she was, till within seven or eight weeks of her death, up and around, capable of going out to visit and on business, and of looking after and doing a portion of her own work, though in delicate health, under the care of a physician, and needing help most of the time, though having help less than one-half of the time.

Fifteenth. That the proceeds of the farm, exclusive of the house and orchard, were sufficient to supply the said Elizabeth with staple provisions and common groceries, and that the same would have rented for at least $150 per year; that the said Elizabeth received from the estate of said Elva, during the time she survived her, cash as follows:

From certificate of deposit	$385 00
From executor of estate,	58 00
Charles, use 12 acres,	36 00
	$479 00

That there were in the hands of the executor, at the time of her death, belonging to Elva's estate, $165.

Sixteenth. That the legitimate cash expenditures during the time the said Elizabeth survived the said Elva, for her comfortable support, would not and did not exceed the sum of five hundred dollars ($500), including hired help and physician fees, the use and production of the farm being considered.

Seventeenth. That there was a sufficient for the comfortable support and maintenance of the said Elizabeth out of the money, personal property and rents and profits of the realty, without conveying said real estate away; and that as a matter of fact the contingency which would have made the power of defendant in the will of said Elva operative, did not arise.

Eighteenth. That the said Charles Dieffenbacker was at the

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time of the conveying said property to him insolvent and without means to purchase, and the only consideration in money paid by him for the same was the amount he was able to mortgage said property for.

Nineteenth. That the said Charles now claims title to and holds possession of said real estate, to-wit, the twenty acre piece lying north of the road, and heretofore more particularly described, and the twenty-five acres of the fifty-eight acres heretofore described, and was at the time of the commencement of this suit withholding the possession of said premises under and by virtue of said deeds, marked Defendant's Exhibits A and B. That the said Charles lived with his mother at the time the second deed (Exhibit B) was made, and continued so to live until the time of her death; that prior to that time he lived near her, and was well acquainted with her circumstances, and all the various facts set forth in these proceedings.

Twentieth. That it does not satisfactorily appear that the said defendant, before the commencement of this suit, ousted the plaintiff from the use and enjoyment of the east twenty-five acres of the west fifty acres of the west half of the northwest quarter of section eight, township and range aforesaid; that a fair market valuation of the twenty acres north of the road would be $16, and of the fifty acres $45 per acre.

Twenty-first. The files, records and all exhibits offered in evidence in this case, and allowed, are hereby especially referred to and made a part of these findings.

CONCLUSIONS OF LAW.

By the terms of the will of Elva Dieffenbacker, her mother Elizabeth had a life-interest in her estate, coupled with a power to sell upon the happening of a contingency. This is not a case of power to sell at discretion, which would create a fee; but the power depending upon a contingency, it is incumbent upon those claiming title by the exercise of the power to show that the power was well executed, and that the contingency actually, as a matter of fact, had arisen at the time the power was exercised. Upon them, the defendants, is the burden of proof to show that fact.

It cannot be presumed from the terms of the will that any such contingency could arise, empowering sale of realty, while there were money, goods or chattels of said estate on hand; and an insufficiency of money, goods and chattels to comfort-

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ably support said Elizabeth was a condition precedent to sale of real estate.

It is argued with much force and insisted by counsel that credit should be given for the money expended by said Elizabeth for the completion of the house, for the funeral expenses of Elva, for a monument, and for other apparently legitimate debts and charges against the estate of said Elva, and that, should credit be so given, it would appear from the evidence that the contingency creating power to dispose had arisen; but these, if legitimate, should have been proved and allowed in the probate court. By the express terms of the will the power and authority to pay these debts, if just, was conferred upon the executor, as such. It was the expressed will of the testator that this power should only be exercised by that officer *as such*. If Elizabeth Dieffenbacker took it upon herself, in the face of that provision in the will, to administer the estate of her daughter, she certainly did it at her peril and the peril of those claiming under her, and the court is not warranted in sustaining the action, and allowing accounts which have never been presented to the proper tribunal for adjudication.

It is claimed that as money left in bank by Elva belonged to her estate, and was drawn without authority of her representative by an unauthorized endorsement, there was no valid payment of the same; that the representative of Elva could still demand and recover the same, and the said Elizabeth would not be obligated to use such money for her support before she would be authorized to sell; but surely, if the said Elizabeth, by requesting and appropriating said certificate of deposit, kept the same from the knowledge of the executor, and deprived the estate thereof, at this time, she and those claiming under her would be estopped from claiming advantage by her wrong.

In the event of the happening of the contingency creating the power to sell real estate, the authority would only arise to use so much as was reasonably necessary for her comfortable support, and the sale must be made for that purpose, and with that view only. Even though the contingency might have existed, if the sale was made for other purposes, it would be ultra vires and void. Unfortunately, the circumstances surrounding this case lead to the impression that a purpose to subvert the provisions of the will governed the conduct of the parties to the conveyance in question, rather than an honest purpose to properly and judiciously execute the power.

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The sales, made as they were by Elizabeth Dieffenbacker to her son Charles, a person without means and involved, who never paid anything upon the same except what he could raise by mortgage on the property bought; the small consideration; the sale of the twenty acres with the house where she lived while a smaller and much less valuable and useful tract remained,—taint the transaction with a lack of honest motive not tending to substantiate the claim that her necessities created the contingency authorizing the conveyance.

No ouster is considered to have been shown as to the east twenty-five acres of the fifty acres in question, and as to that the plaintiff cannot recover the same in this action. It is therefore considered, upon the facts proved and the law found by the court, that the said plaintiff is entitled to the premises described in the third count of her declaration, viz., the west half of southwest quarter of southwest quarter of section 5, town and range aforesaid, consisting of 20 acres; and under the fourth (4) count in said declaration, to an undivided one-half interest in the property described therein, to wit, an undivided one-half interest in the west twenty-five acres of the west half of northwest quarter section eight (8), town and range aforesaid.

Let a judgment be rendered accordingly."

This statement of the case will be sufficient for the purposes of an examination of the legal questions.

I. Defendant contends that the court had no power to permit an amendment of the declaration which substituted one party plaintiff for another. This it is said made a new suit of it; the defendant has never pleaded in that suit, but he was compelled, notwithstanding his objection, to proceed to the trial of a case in which, if there was any issue, it was one made by the court itself, without his consent and against his remonstrance. The statute of amendments is not broad enough to authorize a change of parties and the substitution of a new action by another plaintiff.

This contention is plausible, but we think not sound. In *Kimball &c. Co. v. Vroman* 35 Mich. 310, a declaration against "William A. Tomlinson as president for the time being, of the Kimball & Austin Manufacturing Company, a company organized and existing under and by virtue of the

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laws of said State, and doing business at Kalamazoo in the county aforesaid," was allowed to be amended on the trial by striking out the name of Tomlinson and the designation of his official character, leaving the declaration to stand as one against the company, as defendant. This may be said to have been a change of the party defendant; but the purpose had been to charge the company; the declaration counted on an obligation of the company, and the amendment did not change the issue which the parties had expected to try. In *Kinney v. Harrett* 46 Mich. 87, an error had been committed in planting the suit of precisely the same character with that committed in this case; but it was said that as the title claimed by the wards was set out in the declaration, and the guardian was only a nominal party, the court in its discretion might have permitted an amendment. We think so still.

The defendant complains that he had no opportunity to plead to the amended declaration. But the circuit court was not informed that he desired any such opportunity, nor is there any reason to suppose he did. There is no pretense or suggestion now that any different issue was desired than the one made by the plea before filed, and on which trial was had, and no ground for any supposition that the defendant was deprived of any substantial right by either the amendment or the order to proceed to trial.

II. The objection to the probate of the will of William Dieffenbacker in the county of Lenawee is also, we think, without merit. The objection assails the probate collaterally on the ground of the want of interest in Armstrong, the petitioner for the probate. It appears, however, from the petition which Armstrong presented, that he had an interest, for he represents himself as being guardian of this plaintiff, who was an infant, and claimed title to land through the will. If the fact was as he represented, his interest was unquestionable. *Mower's Appeal* 48 Mich. 441. This seems to be conceded; and the objection is, not that he did not show his interest by his allegations, but that it does not appear that he proved it. To this the sufficient reply is that the contrary does not appear.

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The probate courts of this State are courts of general, and for the most part of exclusive, jurisdiction in probate matters: *People v. Wayne Circuit Court* 11 Mich. 393; *Woods v. Monroe* 17 Mich. 238; *Church v. Holcomb* 45 Mich. 29; and their orders and decrees are not to be collaterally attacked on any assumption that they may have exercised their jurisdiction without evidence to support the allegations. All presumptions are that their action, when properly invoked, is rightful; and a contrary presumption would be particularly unreasonable in a case like the present, where, if Armstrong was guardian as he claimed to be, it is highly probable he was appointed such guardian by this very court, so that the record evidence of the fact would be before the judge to whom the petition for probate was presented, and who in that case would take judicial notice of the fact. But if the appointment had been made elsewhere, there is nothing in this record to show that proof of it was not duly made, and it is consistent with all that appears that the allegations of the petition were duly supported. The action of the probate judge assumed that he was satisfied of their truth; and when his action is collaterally assailed, the presumption in support of it must be that he was satisfied in a legal way and by proper proof.

The case differs essentially from *Besançon v. Brownson* 39 Mich. 388, for in that case there was no showing of interest by the petition. And it may not be improper to remark, though the fact may have no legal significance, that the party now setting up the Michigan probate is one whose interest under it is not disputed, and who, so far as such a thing is possible, may be said to adopt and sanction, as she certainly relies upon, what the party who unquestionably is now rightfully acting for her, assumed then to do.

III. The principal questions in the case arise on the will of Elva Dieffenbacker, who, after providing for the payment of debts and funeral expenses and making a small specific gift, gave to her mother Elizabeth Dieffenbacker, under whom the defendant claims, all the rest, residue and remainder of her property, of whatever nature, for and during her natural life; and in case the use of the property should be insufficient for her

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support, then and in that case authorized her to dispose of such and so much of the property as should be sufficient for that purpose. The position is taken that by this gift Elizabeth Dieffenbacker took a fee in the lands; but this we do not concur in. She had a life-estate only, with conditional power of disposal. *Terry v. Wiggins* 47 N. Y. 512; *Minot v. Prescott* 14 Mass. 496.

The power to dispose of the property was conditioned upon the use thereof being insufficient for the beneficiary's support. The plaintiff contends that the general rule that real property is only to be resorted to when the personalty is exhausted is applicable to such a gift; and therefore the contingency in which the power to dispose of the real estate might be exercised never occurred; it appearing that the executor of Elva Dieffenbacker had money on hand applicable to the support of Mrs. Dieffenbacker, both at the time when she assumed to execute the power of sale, and also at the time of her death. It is also urged for the plaintiff that Mrs. Dieffenbacker could not be the judge of the necessity of making sale of the land, but that the necessity must appear to have existed as a fact. *Minot v. Prescott* 14 Mass. 496; *Stevens v. Winship* 1 Pick. 317; *Larned v. Bridge* 17 Pick. 339; *Paine v. Barnes* 100 Mass. 470; *Hull v. Culver* 34 Conn. 403; *Henderson v. Blackburn* 104 Ill. 227; *Warren v. Webb* 68 Me. 133. On the other hand it is contended for the defendant that Mrs. Dieffenbacker under the will had no more and no different authority to dispose of the personalty than of the realty; the condition was single and applied equally to both; she was absolutely entitled to the *use* of both, and to dispose of the property, real as much as personal, when the use should prove insufficient. And this seems to be warranted by the phraseology of the will.

But whatever might be the construction of the will if the personalty were anything besides money, it would be an unreasonable and wholly unwarranted construction that would justify an exercise of the power to sell, for the purpose of raising money, when there was already money on hand with which the object of the testator's bounty could be accom-

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plished. It was her manifest purpose to preserve the body of her estate intact for this plaintiff, unless a sale should be necessary for her mother's support; and the only purpose that could exist for making any sale would be to produce a fund which could be made use of for such support. If a fund already existed, unappropriated and uninvested, as apparently was the case here, the creation of a further fund, by a sale of either lands or chattels, would, if within the terms of the power, be an abuse of it. But we do not think it could be held to be within its terms. And Mrs. Dieffenbacker apparently must herself have thought she was at liberty to make use of any money on hand, for she proceeded to draw the money from the bank and make use of it immediately after her daughter's death; a lawless act, in so far as it was accomplished by the unwarranted use of her daughter's name in indorsing the certificate, but not otherwise unwarranted if the money was needed for her support.

But we also think the court had evidence tending to show that the conveyances made by Mrs. Dieffenbacker to defendant were made in fraud of the plaintiff's rights, and by a perversion of the power given by the will instead of being in bona fide execution of it. The defendant had no means to buy lands with, and was not a person to be looked to as a purchaser if a sale for the raising of money was in contemplation; and a sale to a person without means when ready money was the nominal purpose, must necessarily be suspicious. But the consideration in one case, at least, was grossly inadequate; and so it was in the other also, unless much importance is attached to the life-lease which was given back. But the transaction in that case looks very much like one fixed up for a purpose different from the one professed.

Complaint is made that the judge refused to find that the completion of an unfinished house which was begun by Elva, and was her mother's home after Elva's death, was a proper expenditure for the mother's support. But the argument for such an expenditure would hold good in support of an expenditure for the erection of an entirely new building had Elva left none, or in justification of any particular improve-

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ment upon the land which would be calculated to make it more productive. It would apparently have been a very proper and desirable thing for Elva to have provided for the completion of the unfinished house for her mother's occupation, but she failed to do so. She merely provided a fund for her mother's support; and the building of a house, in whole or in part, cannot be considered a part of the support of the person who is to occupy it.

No errors appear in the case, and the

Judgment must be affirmed.

The other Justices concurred.

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HENRY BETTIS v. NORMAN GEDDES, PROBATE JUDGE, AND THOMAS M. HUNTER, COUNTY CLERK.

Special drain commissioner.

A probate judge's ex-parte appointment of a special commissioner in proceedings to construct a drain is void where no notice of the petition for such an appointment was given to those who would be taxed for the drain.

Certiorari. Submitted June 24. Decided Sept. 23.

Otis A. Critchett and *Millard, Weaver & Weaver* for petitioners.

O. F. Sheldon and *Cahill, Ostrander & Baird* for respondents.

SHERWOOD, J. This case is certiorari to the probate court of Lenawee county, bringing before us for revision proceedings had on the petition of Davoll and others for the appointment of a special commissioner, and the laying out and construction of a drain to be located partly in said county and partly in Monroe county. The return in the case shows that the petition was presented to the probate court on the 21st

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day of April, 1882, without any notice being given of such presentation, and was acted upon by the judge and the appointment made on the same day without any notice of the time and place when the same would be heard being previously given to the persons interested and whose property was to be taxed for the construction of the ditch; and without any proofs being offered or evidence taken the court proceeded ex parte and made the appointment of a commissioner. It is unnecessary to consider any of the subsequent proceedings. Without such notice the probate judge had no jurisdiction in the matter, and the proceedings were void.

It was so held in the case of *Township of Whiteford v. Probate Judge of Monroe County* 53 Mich. 130.; and we see no reason to depart from the views there expressed.

The proceedings in the case must be quashed.

The other Justices concurred.

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FRANK VAN HOESEN v. ALEXANDER CAMERON.

Warranty of soundness—Usage.

1. One who sues on a warranty of the soundness of a horse can show by the testimony of a former owner that the horse while owned by him was diseased, if the disease was one which might have resulted in subsequent unsoundness.

2. A warranty of the soundness of a horse, unless expressly restricted, extends to all manner of soundness, whether known to the vendor or not, and the question whether the animal was in any way unsound at the time of sale is for a jury.

3. In an action upon a warranty the allowance of a hypothetical question which did not relate to the condition of the article sold at the time of the sale was held to be cured by a cross-examination which supplied the omission and placed all the facts necessary to the formation of an opinion before the witness.

4. Usage cannot be shown to modify the essential terms of a contract, whether expressed or implied, nor be shown at all if it conflicts with the settled rules of law, or unless it is known to the parties. It is

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contracts made in the ordinary course of business without particular stipulation that are presumed to be made in the light of usages.

5. A custom among horse dealers that a warranty shall not extend to latent defects cannot be shown to affect a horse trade with a man who was not accustomed to dealing in horses, and to whom an explicit warranty of soundness was given.

6. A request to charge that has no testimony to base it on is properly refused.

Error to Kalamazoo. (Mills, J.) June 25.—Sept. 23.

Assumpsit. Defendant brings error. Affirmed.

Oscar T. Tuthill for appellant.

Germain H. Mason for appellee.

Champlin, J. This action is assumpsit for a breach of warranty of soundness of a horse.

The plaintiff bought a span of black mares of defendant in April, 1882; one was known as the Sleeper mare, and the other as the McAllister mare. The plaintiff claimed and gave testimony tending to prove that at the time of purchase defendant warranted the McAllister mare to be all right and sound in every respect. This was on the 10th of April, and on the 15th of April she was found to be sick, and he sent for a veterinary surgeon, by the name of Sutton, who pronounced her disease pleuro-pneumonia. She remained sick until the 8th of May, when she died. Dr. Sutton made a post-mortem examination on the 9th of May, which he described with particularity.

To entitle the plaintiff to recover, it was necessary for him to show that the horse was unsound on the 10th of April when he purchased. His theory was, and his testimony tended to prove, that the mare in question was diseased from the effect of a previous attack of pleurisy at the time he purchased, and that such disease continued, and finally resulted in the death of the animal. It was held in *Briggs v. Crick* 5 Esp. 99, that in an action against the vendor of a horse, upon a warranty of soundness, he might call as a witness the one who had sold and warranted the horse sound to

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him, or any other former proprietor of the horse, who had sold him with a like warranty, to prove the soundness of the horse. Within the same principle it was competent for the plaintiff to show that this mare was sick with the pleurisy or pleuro-pneumonia while McAllister owned her. The testimony of Dr. Sutton, showing that he had treated her for the same disease of which she afterward died, and that it had continued and had not been eradicated in the meantime, was competent and admissible testimony. Of the same character was the testimony of the other witnesses introduced by the plaintiff, tending to prove that the mare was affected with some disease of the chest before she was sold to the plaintiff. It tended to support the plaintiff's theory, and its weight was for the jury, considered with all the other testimony in the case. There is no rule of law which confines the purchaser in an action upon a warranty of soundness to the exact day of sale, or to the appearance of the animal on that day. Horses being subject to secret maladies, it is the very object and purpose of a warranty of soundness to protect the purchaser against such latent defects, and the advantage derived from an express warranty of soundness is that it extends to every kind of soundness known and unknown to the seller; and if at the time of sale the animal had any infirmity upon her which rendered her less fit for present service, the warranty, if one existed as plaintiff claimed, was broken.

The question of soundness or unsoundness is one peculiarly fit for the consideration of a jury, and this Court will not feel justified in setting aside a judgment rendered upon a verdict of a jury when the evidence is conflicting, if the case has been fairly submitted to them under proper instructions, unless there has been substantial error committed which the Court can see affects the rights of parties.

Dr. Sutton, after giving testimony showing his knowledge of the mare both before and after the sale to plaintiff, and after describing what he found upon the post-mortem examination, was permitted to give his opinion as to whether the mare was sound on the 10th day of April, 1882, at the time

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she was sold to plaintiff. The testimony given by this witness was what is usually denominated expert testimony; and the opinion of the witness upon the question of soundness at the time of sale was relevant and proper. Expert testimony was introduced on the part of the plaintiff to prove that the mare was unsound at the time of sale to plaintiff, the witnesses not having seen the mare but basing their opinions entirely upon what was claimed to have been facts testified to in the case. Two hypothetical questions were asked,—one calling for the opinion of the witness of the disease of which the animal died; and the other as to whether or not in the opinion of the witness she was sound on the 10th of April, 1882. Counsel for defendant objected to the question as being incompetent and improper "in that it did not state the facts in this case as they were disclosed in the evidence; that there was no testimony that the post-mortem examination was correct, but on the contrary there was no compression of the right lung or any difficulty noticed in that organ, but that it was an assumed state of facts not based on proof." And on the argument in this Court counsel insists that the question was faulty because it did not assume as a fact that at the time of sale the mare "acted well, performed well, and in all respects nothing wrong about her could be noticed, upon careful examination."

The fact of soundness on the 10th of April being the fact in issue under plaintiff's claim, any hypothetical question which omitted the condition of the mare on that day must have been erroneous, if not cured by subsequent examination of the witness; but the record discloses that after making objection to the question on that ground the counsel for defendant, in the cross-examination of the witness, supplied the omission and called out from him his opinion based upon these additional facts, and including them in the question, that the animal was diseased on the 10th day of April. Taking the direct and cross-examination together, all the facts upon which it was competent to base an opinion were placed before the witness, and the jury could determine what weight to give to the opinion expressed, and also whether

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such facts had been established to their satisfaction. The defendant's counsel states in his brief that the hypothetical question assumes facts which do not appear in the evidence, but he fails to point out the facts assumed that do not appear in the evidence. We have, however, very carefully examined the record, and we fail to discover the discrepancy, if any exists. The expert testimony was properly admitted.

The defendant controverted the allegation that he warranted the mare sound, and in this respect the testimony of the plaintiff and defendant stood directly opposed to each other. Defendant's theory was that the mare was sound on the 10th of April, 1882, and that the disease with which she was attacked on the 15th of April, and of which she died on the 8th of May, was acute pleurisy; and he produced the evidence of experts who gave evidence tending to support his theory. The defendant asked the witness Fuller the following question: "Are you acquainted with the custom or usage here, in the sale of horses, with reference to the statement or words 'sound and all right,' when used with reference to selling horses?" This was objected to as calling for a legal conclusion; and thereupon the defendant's counsel stated that he "proposed to show what the custom or usage is here, and was at that time, as the general understanding of the word 'sound,' when used in the selling of horses, to be such among dealers in horses that it was such a state of facts as, upon careful examination by good judges, would have been pronounced sound from all appearances and indications." The testimony was excluded. The defendant's counsel insists that this was a most important error, affecting the rights of defendant and the law in the sale of horses.

It is well settled that parties contracting are supposed to do so with reference to the *known* usages and customs which enter into and govern the subject-matter to which the contract relates, and all contracts made in the ordinary course of business, without particular stipulations to the contrary, are presumed to be made in reference to the usages and customs which exist; but this rule is subject to the wholesome limitation that such usage must not conflict with the settled rules

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of law, nor go to defeat the essential terms of the contract, either expressly or by implication. *Mages v. Atkinson* 2 M. & W. 442; *Adams v. Wordley* 1 M. & W. 374; *Trueman v. Loder* 11 Ad. & El. 589; *Yates v. Pym* 6 Taunt. 446; *Ins. Co. v. Wright* 1 Wall. 456; *Barlow v. Lambert* 28 Ala. 710; *Lewis v. Thatcher* 15 Mass. 431; *Homer v. Dorr* 10 Mass. 26; *Barksdale v. Brown* 1 N. & McC. 517; *Allen v. Dykers* 3 Hill 593; *Hinton v. Locke* 5 Hill 437; *Gross v. Criss* 3 Grat. 262; *Barnard v. Kellogg* 10 Wall. 384; *Blackett v. Royal Exch. Assurance Co.* 2 Cr. & J. 249; *Simmons v. Law* 3 Keyes 219; *Coxe v. Heisley* 19 Penn. St. 243.

Where a contract is clear, certain and distinct, it cannot be modified by proof of usage, for the reason that it disposes of all customs by its own terms which alone regulate the rights of the parties and determine their liabilities. A contrary doctrine would work incalculable mischief, and make the rights of property depend, not upon the contract of the parties governed by established principles of law, but upon what is called the custom of particular places, so that every town and village in the State will have its own particular code in conflict with the settled law. In cases where evidence of usage is admissible at all, it is only on the ground that the parties who made the contract are both cognizant of the usage, and must be presumed to have made their agreement with reference to it. In the record before us there is nothing in the case which tends to show that the plaintiff had any knowledge of such custom as defendant sought to prove. The evidence is that he was a farmer, and had purchased such horses as he had needed upon his farm, and had sold some from his farm; but in what market he purchased or sold does not appear. The testimony does not show him to have been a dealer in horses, and consequently the offer to show the existence of a custom among dealers in horses in Kalamazoo did not tend to show that plaintiff was cognizant of such custom.

The conclusive answer to the proposition is that the custom sought to be proved was inconsistent with the contract of

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warranty. The plaintiff had given evidence tending to prove the contract, and the defendant had been sworn as a witness in his own behalf, and had denied making any warranty of soundness, as testified to by the plaintiff. Under these circumstances it was not competent for him to give evidence of a custom among dealers to show that a warranty of soundness did not extend to latent defects unknown to defendant, or to such defects as were not apparent to good judges upon a careful examination. The case comes directly within the principle laid down in *Yates v. Pym* 6 Taunt. 446, and the other cases cited above, and the evidence was properly excluded. The court was careful to instruct the jury upon the defendant's theory and proofs, that a warranty of soundness might be restricted in terms, as the seller saw fit, and that he could not be held liable beyond that, and that if they should find, from the evidence, that the defendant said to plaintiff: "The mare is all right, so far as I know. I think she is sound. I know nothing to the contrary,"—or words to that effect, while the negotiations were going on, and at the time of sale, then he could not be held liable in this action.

The defendant's counsel requested the court to instruct the jury that "the test in this case is, did Cameron assume to assert a fact of which Van Hoesen was ignorant, or merely his opinion or judgment upon a matter of which he had no special knowledge, of which Van Hoesen may be expected also to have an opinion and to exercise his judgment. And this intention is a question of fact for the jury to find from the nature of the sale and the circumstances attending it." This was properly refused. There was no testimony in the case to base such request upon. The testimony upon which plaintiff based his right of recovery was not founded upon expression which might be construed as expressions of opinion, but upon an express warranty in these words: "The McAllister mare. I have known her ever since McAllister brought her here last fall, and I have known her to be all right and sound in every respect, and I will warrant her to be so, and at that I took the mares." Here was no assertion

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of opinion or expression of judgment, but a positive undertaking by defendant that the mare he was then selling was then all right and sound in every respect. The language expressed the intent without ambiguity, and the real question for the jury to find was whether he did make the warranty as plaintiff claimed.

The court properly instructed the jury that the questions to be determined by them were: *First.* Did the defendant warrant the mare was sound at the time he sold her to the plaintiff? *Second.* Was she sound at that time? *Third.* If the warranty was made, and the mare was not sound at the time of sale, what, if any, damage has the plaintiff sustained? That the burden of proof was upon the plaintiff to establish by a preponderance of evidence that the warranty was made by defendant, as he claimed, and that the mare was at that time unsound of the disease of which she subsequently died; and that if they should find that the warranty was made as claimed by plaintiff, and at that time she was diseased, or suffering with the seeds of disease which necessarily, in the ordinary course of events, caused her death, the plaintiff would be entitled to recover; and that, if they should find from the evidence that she was at the time of sale sound and free from disease, or from the seeds of disease which must necessarily, in the ordinary course of events, have caused her death, although they should further find from the evidence that she afterwards became unsound, still such subsequently acquired disease would furnish no grounds of recovery in this action; that to entitle the plaintiff to recover in this case, they must find that the cause of disease existed in the animal at the time of sale. And the court instructed the jury as to the rule of law relative to warranty of soundness as follows:

"The rule of law as it is laid down in the books in this class of cases is, that if, at the time of the sale, an animal has any disease which actually does diminish the actual usefulness of the animal so as to make it less capable of work of any description, or which, in its ordinary progress, will diminish the natural usefulness of the animal; or if the

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animal has, either from disease or accident, undergone any alteration of structure which either actually does at the time of sale, or in its ordinary effects will diminish the usefulness of the animal, such animal is unsound."

We think the court gave the proper instructions to the jury covering the whole issues, and with great propriety avoided a discussion of the facts which were entirely within the province of the jury; and although we have not discussed all the errors alleged and exceptions taken, which were ably and forcibly presented to us on the argument of the case, yet we have considered all the points raised and perceive no error in the record, and the judgment is

Affirmed.

The other Justices concurred.

JOHN H. PALMER AND MICHAEL BROWN v. ADDIE L. KEAM, JOHN FRANKLIN HERRICK ET AL. 54 617 64 77

Payment of general legacies—Change of trustees.

1. General legacies of fixed sums of money are payable whenever the condition of the assets of the estate will admit of it, if no time of payment is fixed.

2. A testator, after specifying a number of legacies, bequeathed the whole of his estate to two certain persons as executors, in trust for the payment by them of debts, expenses and legacies. The trust duties related to the distribution of the estate, and were not substantially different from those of executors. To one of the executors he had made a specific bequest. He also empowered them to employ a certain person as counsel. He afterward, by codicil, revoked the specific bequest to the executor and appointed in his stead the person named as counsel, adding that it was his intention to so change his will that the superseded executor should not receive any legacy or benefit whatever by virtue thereof. *Held*, that this revoked also his appointment as trustee, and substituted the later appointee to perform the trust duties in his place.

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Appeal from Mecosta. (Fuller, J.) June 25.—Sept. 23.

BILL to construe will. Defendants appeal. Affirmed.

John E. More for complainants. To constitute the person named in the will as executor a special trustee, separate and apart from his office of executor, it is not enough that the powers granted to him, or the duties imposed upon him in relation to a particular fund, be such as are unusual in the course of ordinary administration; it must also appear that the intention was to withdraw the particular trust from the management and control of the executor as such, and to create a separate office for its management; and this must appear in the face of the presumption that every provision made in the will for the management of the estate, and every part thereof, before it passes into the hands of the beneficiary, was intended as a direction to the executor in his official character: *Mathews v. Meek* 23 Ohio St. 272, 289; *Lantz v. Boyer* 81 Penn. St. 325; *Lansing v. Lansing* 45 Barb. 182; *Colt v. Colt* 33 Conn. 270; a codicil contains nothing but the revocation of the appointment as executor of one who was also trustee, and the appointment of another in his stead; the latter would have as full power to execute the will as though he had been originally nominated executor: *Pratt v. Rice* 7 Cush. 209; where a power of sale is given to executors for the purpose of paying debts and legacies, or either, and especially where there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power of sale is imperative, and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and under the statute passes to and may be executed by the administrator with the will annexed: *Chandler v. Rider* 102 Mass. 271; *Gould v. Mather* 104 Mass. 289; *Warden v. Richards* 11 Gray, 277; *Lantz v. Boyer* 81 Penn. St. 325.

Roger W. Butterfield and *G. V. N. Lothrop* for appellees. Where a person is appointed executor and trustee, the offices are distinct, and the acts appertaining to each are to be performed by each in their respective capacities: *Wheatly v. Badger* 7 Penn. St. 459; *Matter of Wadsworth* 2 Barb. Ch. 381; *Tainter v. Clark* 13 Met. 220; *Daggett v. White* 128 Mass. 398; *Ebert and Barnitz's Appeal* 9 Watts 300; *Case of Elizabeth Baird* 1 W. & S. 288; *Denne v. Judge* 11 East 288; where one is appointed executor and trustee, he may

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decline to act in one capacity and act in the other: *Clark v. Tainter* 7 Cush. 567; *Garner v. Dowling* 11 Heisk. 48; *Williams v. Conrad* 30 Barb. 525; *Estate of Besley* 18 Wis. 451; *Knight v. Loomis* 30 Me. 204; *Williams v. Cushing* 34 Me. 370; or he may be removed from one office and not from the other: *Quackenboss v. Southwick* 41 N. Y. 117; to act as trustee, it is not necessary even that the will should be probated, and unless he has deeded or disclaimed, the trustee can execute a conveyance of the property: *Judson v. Gibbons* 5 Wend. 224; *Dominick v. Michael* 4 Sandf. 401; where a person is appointed to both the offices of executor and trustee, a revocation by the codicil of the appointment to the one will not revoke his appointment to the other office: 1 Jarm. Wills 346; 1 Redf. Wills 362, note 70; *In re Howard* L. R. 1 Prob. & Div. 636; *In re Park* 14 Simons 89; *Hare v. Hare* 5 Beav. 629; *Graham v. Graham* 16 Beav. 553; *Cartwright v. Shepheard* 17 Beav. 301; *Worley v. Worley* 18 Beav. 58; *Battelle v. Parks* 2 Mich. 532; *Ferre v. American Board* 53 Vt. 172; *Dunning v. Ocean Bank* 6 Lans. 299; *Weimar v. Fath* 43 N. J. L. 4; *Conklin v. Edgerton* 21 Wend. 440; *Brown v. Hobson* 3 A. K. Marsh. 380; *Noel v. Harvey* 29 Miss. 72; *Ross v. Barclay* 18 Penn. St. 179; where the power given by will involves special discretion in its exercise, and indicates special trust and confidence in the donee, it cannot be exercised by a successor in office: 1 Sugd. Powers 209–11 [153] 204 § 146; Perry on Trusts §§ 496, 497, 507; *Tainter v. Clark* 13 Met. 226; *Robson v. Flight* 4 DeG., J. & S. 614; 4 Kent's Com. 381; *Partee v. Thomas* 11 Fed. Rep. 776; *Beekman v. Bonsor* 23 N. Y. 303; *Ellison v. Ellison* 6 Ves. Jr. 656; where a will nominates an executor and provides for trusts to be executed by "said executor," without words to show an intention that the power should vest in any other person who may be appointed executor, the trust does not vest in the office: *Simpson v. Cook* 24 Minn. 180; the addition, either by a subsequent clause or a codicil, of another as co-executor, without referring in any manner to the trust and power vested by the preceding part of the will in the person first named as executor, does not show an intention to add another trustee or grantee of the power: *Bartlett v. Sutherland* 24 Miss. 395; *Perkins v. Lewis* 41 Ala. 649; *Shelton v. Homer* 5 Metc. 465; *Dominick v. Michael* 4 Sandf. 375; where a joint power is given, of the kind mentioned in the will, there being nothing to show an intent that it shall be separately exercised, it

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cannot be exercised by either alone: 1 Sugd. Powers 202; *Shelton v. Homer* 5 Metc. 465; *Rumney v. Coville* 51 Mich. 186; *Hall v. Dewes* 1 Jacob's Ch. 192; 2 Williams on Executors 951; *Berger v. Duff* 4 Johns. Ch. 369.

CAMPBELL, J. Complainants, who are executors of John F. Brown, deceased, filed this bill to have the question settled whether they are empowered to carry out all the provisions of his will, or whether, as to part of them, the powers and duties were vested in complainant Brown and Thomas C. Platt. The court below decreed that the complainants were the persons authorized to act. The dispute arises under a codicil.

John F. Brown, of Big Rapids, first made his will on May 3, 1879, and provided as follows: (1) He gave to several relatives named, in the aggregate $53,000, and to Thomas C. Platt of Owego, New York, $5000, making in all $58,000 of absolute and unconditional legacies in money. (2) He bequeathed $10,000 each to three nephews, Harry Brown, John Franklin Herrick, and Marcus E. Herrick, payable out of his estate ten years after his decease, by his executors. But the executors were required, as soon as his property could be converted into money, to invest these sums in such securities as they should deem good and safe, and pay each of said three legatees semi-annually the interest on his bequest of $10,000. (3.) A bequest of $10,000 to a sister was required to be divided equally among several nephews and nieces named, if she died before testator. (4) The residue of his estate was given in equal shares to three nieces named and to the three nephews named. But the nephews were to have their respective shares in this residue paid them by the executors, as each should become twenty-five years old.

After these bequests comes the clause which is supposed to create the difficulty. It is as follows:

"I give and bequeath and devise all my real and personal estate, of what nature or kind soever, to Thomas C. Platt, of Owego, Tioga county, New York, and Michael Brown, of the city of Big Rapids, Mecosta county, Michigan, the

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executors of my last will and testament, hereinafter nominated and appointed, in trust for the payment of my just debts, funeral expenses, and the legacies above specified, with power to sell or dispose of the same at public or private sale, at such time or times, and upon such terms, and in such manner, as to them acting in good faith and using their best judgment shall seem meet; provided, however, that no part of my real estate shall be sold at public auction until after the expiration of three years from the time of my decease, and no part of my personal property shall be sold at public sale until after the expiration of one year from the time of my decease."

The will then provided that certain stock in the Tioga Manufacturing Company should not be sold by his "said executors" unless, in their judgment, necessary to prevent loss, but they were to hold it and participate in meetings as if they were absolute owners. If dissolved, whatever money should come into the hands of his "said executors" should be paid out by them pursuant to the will. He then nominated Thomas C. Platt and Michael Brown to be the executors of the will, and directed that they should receive a reasonable compensation for the business necessary to be done in the settlement of his estate. He further directed that "my said executors employ John H. Palmer, counsellor at law, Big Rapids, Michigan, as their legal adviser in the settlement of my estate."

On the 20th of February, 1881, the testator made a codicil to his will to the following effect: Having first recited the former appointment of Thomas C. Platt as one of the executors of his will, he proceeds:

"Now I hereby revoke the nomination and appointment of the said Thomas C. Platt, as such executor of my last will and testament. And I do hereby nominate and appoint my friend John H. Palmer, counsellor at law, of Big Rapids, Michigan, as one of the executors of my last will and testament, who shall, with Michael Brown, the other executor therein named, execute the same. And whereas, in my last will, I have directed the executors therein named to employ the said John H. Palmer as their legal adviser in the settlement of my estate, which direction so made and given I

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hereby revoke, and authorize my said executors to employ such legal adviser as to them may seem necessary. And whereas, also, I did provide in my said last will and testament for the payment to the said Thomas C. Platt of a legacy of five thousand dollars, now I hereby revoke my said last will and testament, so far as the same provides for the payment of said legacy to the said Thomas C. Platt, it being my intention to so change my said last will and testament that the said Thomas C. Platt will not receive any legacy or benefit whatever by virtue thereof, and in all other respects confirm my said last will."

Palmer and Brown, the two executors named in the codicil, have duly qualified. The only question now presented is whether Palmer takes Platt's place in the general bequest for disposing of the assets. The court below held that he did, and we are of the same opinion.

The will disposes of the entire estate before the provision in question is reached. It had already provided, after payment of debts and funeral expenses, for legacies of fixed sums of money to the extent of $58,000, for which no time of payment was fixed, and which would therefore be payable whenever the condition of the assets would provide for it. It had also provided for the payment of $30,000, ten years after testator's decease, and these payments were expressly required to be made by his executors. It was also made the express duty of the executors to invest this sum of $30,000, and pay its income to the same legatees during the ten years. The residuary bequests to his nephews and nieces exhausted the estate, and there was no deferring of distribution except to three nephews named, and the payments to them were also expressly required to be made by the executors, when those legatees became twenty-five years of age.

Under all these circumstances the various clauses must be read together. The provision which, after all payments and investments had already been laid upon the executors, goes through the form of bequeathing and devising the whole body of the estate to the persons who are named as executors, could not have been intended to undo what had already been done. But when we look at the duties laid upon these

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persons by the clause in question, we see that the whole purpose of the trust, if it can be called a trust, is to provide for what is strictly and solely the distribution of the estate, and involves some powers and duties which fall within the common law and statutory duties attached to the office of executors, and not much else, if anything, not ancillary. The purposes of this trust were "for the payment of my just debts, funeral expenses, and the legacies above specified." These are all the purposes named. The payment of debts, funeral expenses and legacies belongs clearly to the executor's office. So does the sale of personal property. There is no room under this clause for dividing the duties. The trust covers all alike, and the whole property, real and personal, is to be converted into one fund for these connected objects. If the trust does not attach to the executors as such, then they have practically no duties to perform in closing up the estate. It seems to be the natural and reasonable inference that no distinction was intended between the powers granted, and that it was expected the executors would perform them all.

The codicil does not, in our view, sanction any different idea. The mere revocation of a pecuniary legacy to Mr. Platt would not, perhaps, throw much light on the question, if separate trusts had been indicated. But the language goes further than this. If the general bequest in the will was to him and Michael Brown as trustees, distinct from their offices as executors, then that was as plainly a legacy to Platt as the beneficial one. But the codicil, after revoking Platt's nomination as executor, and substituting Palmer in his place, and after revoking the $5000 legacy to Platt, proceeds to recite as follows: "It being my intention to so change my said last will and testament that the said Thomas C. Platt will not receive any legacy or benefit whatever by virtue thereof." This certainly covers the joint bequest in terms at least. Putting will and codicil together we have this further state of things: By the will Mr. Palmer was expressly designated as legal adviser in the settlement of the estate, in which capacity he would be expected to have considerable influence

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in determining the course of the persons named in the will as having charge of it. By the removal of Mr. Platt and the appointment of Mr. Palmer in his place, it is evident Mr. Palmer's position was intended to be more important. But if the trust declared in the will still remained in Platt and Michael Brown, it, as already suggested, covered the whole settlement of the estate and disposal of the assets, and left no important functions whatever to Mr. Palmer, and furnishes no intelligible reason for any such change. It seems to us that this case involves none of those difficulties which have sometimes led to discussion upon the divided functions of executors and other trustees, and that the whole settlement of this estate was designed to be left to the same hands.

The decree must be affirmed,—the costs, however, to be paid out of the estate.

COOLEY, C. J. and SHERWOOD, J. concurred. CHAMPLIN, J. did not sit.

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THE S. C. HALL LUMBER CO. v. MATILDA GUSTIN ET AL.

Depositions—Duress—Complaint of fraud—Lis pendens in cross-suit—Covenant against incumbrances.

1. An order to take testimony before a commissioner cannot be entered until the expiration of the time allowed for claiming examination in open court (Ch. Rule 47); and this cannot be claimed until the cause is at issue as to all defendants or until those who have not answered are defaulted.

2. A deposition prematurely taken is properly suppressed; and if not suppressed would be set aside by a rightful claim to have the testimony taken in open court.

3. There is no duress, as matter of law, when one who, with full knowledge of all facts, releases his claim of equities to those who refuse to recognize it and insist upon an adverse claim, does so in order to induce them to surrender property, the right to which is disputed and which they have detained under a claim of ownership.

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4. A fraudulent settlement is voidable only, and that by a party thereto and not by a stranger.

5. A complaint of fraud is of no significance if made by a stranger to the suit in which it is involved and if he acquiesces in it without any attempt to set aside the fraudulent arrangement.

6. A wrong to one person gives no right of action to another whom it incidentally injures, unless it is a wrong to him also.

7. A suit and cross-suit constitute one cause, and notice of the suit is notice of the cross-suit also. So *held* in the case of a lis pendens filed in an original foreclosure suit, but not in a cross-suit for foreclosure; it was constructive notice to all the defendants.

8. A covenant against incumbrances is not a covenant to defend a suit upon an incumbrance.

Appeal from Muskegon. (Russell, J.) June 25.—Sept. 23.

BILL to clear title. Defendants Gustin appeal. Affirmed.

L. N. Keating, *Edwin Potter* and *A. Dickerman* for appellants.

John E. More for complainant appellee. A purchaser pendente lite takes subject to the determination of the suit: 2 Bacon's Works 479: see How. Stat. § 6619; *Baker v. Pierson* 5 Mich. 461; *Alterauge v. Christiansen* 48 Mich. 60; *Heim v. Ellis* 49 Mich. 241; 1 Story Eq. Pl. § 405; 2 id. §§ 156, 351; Adams' Eq. 157; Pomeroy's Eq. Jur. 633; *Newman v. Chapman* 14 Am. Dec. 766 note; *Bishop of Winchester v. Paine* 11 Ves. 194; *Murray v. Ballou* 1 Johns. Ch. 576; *Inloe's Lessee v. Harvey* 11 Md. 524; *Stoddard v. Myers* 8 Ohio 209; *Ferrier v. Buzick* 6 Ia. 258; *Blanchard v. Ware* 37 Ia. 305: 43 Ia. 530; *Tilton v. Cofield* 93 U. S. 168; *Warren County v. Marcy* 97 U. S. 105–6; *Whiteside v. Haselton* 4 Sup. Ct. Rep. 1; *Fuller v. Scribner* 16 Hun 130: 76 N. Y. 190; *Jones v. McNarrin* 68 Me. 334; *National Bank v. Sprague* 21 N. J. Eq. 535; a cross-bill is a mode of defense: *Richards v. Todd* 127 Mass. 167: 2 Dan. Ch. Pr. (Perk. ed.), 1649; and the original and cross-bill are but one cause: id. 1653; *Galatian v. Erwin* 1 Hopk. 54; a cross-bill is brought by a defendant against a plaintiff or other parties in a former bill depending, touching the matter in question in that bill: 2 Dan. Ch. Pr. 1647; Mitford Eq. Pl. 80, 81; 1 Hoffman Ch. Pr. 345; 2 Barb. Ch. Pr. 128; Story's Eq. Pl. §§ 389, 392, 393, 399, 400, 402; a bill which introduces

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other distinct matters, is an original bill, and the suits are separate and distinct: *Andrews v. Kibbee* 12 Mich. 96; a cause is not at issue under Chancery Rule 47 until a replication has been filed to the answers of those defendants who have answered, if any, and an order pro confesso entered as to all other defendants: *Graham v. Elmore* Har. Ch. 267; *Deford v. Mehaffy* 13 Fed. Rep. 481.

COOLEY, C. J. The original bill in this cause was filed in the name of Stephen C. Hall as complainant, against Matilda Gustin, Alpheus Gustin, Silas Bannister and Albert H. Stewart as defendants. After it was filed Hall's interest was transferred to the corporation known as The S. C. Hall Lumber Company, and by stipulation the bill was amended so as to substitute the lumber company as complainant. The following is a synopsis of the bill as originally filed.

The bill avers that complainant is the owner in fee of certain parcels of land in Muskegon, which are particularly described, upon one of which is situated a steam saw-mill, and that he has been in possession of the same as owner from December 30, 1879. It then proceeds to trace title as follows:

It avers that on November 22, 1872, Asa M. Allen gave to Theo. B. & Albert B. Wilcox a mortgage on said premises, which was duly recorded December 9, 1872, and that on November 12, 1873, said T. B. & A. B. Wilcox assigned and transferred one of the payments secured by the mortgage to the Lumberman's National Bank of Muskegon, as collateral security for the payment of a debt which the assignors owed the bank, and that on April 14, 1874, said T. B. & A. B. Wilcox, L. C. Paine Freer and Sextus N. Wilcox, as complainants, filed their bill in the circuit court for the county of Muskegon in chancery, against said Allen and said bank, claiming that there was a certain amount due to complainants on said mortgage debt, and praying a foreclosure of the mortgage; and on the same day filed in the office of the register of deeds of the county of Muskegon the usual notice of the pendency of the suit, and that defendants appeared and answered in the suit; and on May 24, 1875, the bank filed its

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cross-bill of complaint against the complainants and the said Allen, for the purposes of an adjudication of the amount due to said bank, and for the foreclosure of the mortgage and a sale of the premises for the payment thereof; and that such proceedings were had thereupon that a decree was made dismissing the original bill and granting the prayer of the cross-bill, from which decree an appeal was taken to the Supreme Court, in which court, with a modification it was affirmed; that under said decree the mortgaged premises were sold, and David D. Erwin of Muskegon became purchaser, and received the customary deed. Said Erwin also acquired several tax titles to said premises, and on December 30, 1879, conveyed the premises by warranty deed to the complainants.

The bill then avers that during the pendency of said foreclosure suit, and after notice lis pendens was filed, said Allen conveyed an undivided half of the premises to Alpheus Gustin of Muskegon, who had actual notice of the pendency of the foreclosure suit and was bound by the decree; that on January 22, 1878, Gustin and wife conveyed the undivided half of the premises to Silas Bannister, who also had actual notice of the pendency of the foreclosure suit, and Bannister gave back a mortgage for the payment of six thousand dollars in two, three and four years from date, which mortgage, on March 6, 1880, was assigned by Gustin to his wife Matilda, and on March 8, 1880, Bannister and wife gave a quitclaim deed of said undivided half to Albert H. Stewart of Chicago.

The bill then avers that Erwin immediately after his purchase went into possession of the whole premises as owner; that neither Gustin nor Bannister ever had possession, but that they and said Stewart and Matilda Gustin combined to cloud complainant's title and set up a false pretense that they never had notice, constructive or otherwise, of the pendency of said foreclosure suit, and that said Matilda Gustin has filed her bill for the foreclosure of said Bannister mortgage, making Bannister and his wife and Stewart defendants, but not this complainant, though she well knows complainant is in actual possession; that decree has been made in said last-

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mentioned foreclosure suit, and notice of sale has been published.

The bill then prays for an injunction against such sale, and that complainant's title to the premises be quieted as against the unfounded claims of the defendants and each of them. A temporary injunction was issued and the sale stayed.

The defendants Alpheus and Matilda Gustin answered, denying in general terms all the equities of complainant, and especially denying that they or Bannister had notice of the bank foreclosure suit while it was pending.

They allege that before Mrs. Gustin filed her bill to foreclose the Bannister mortgage, Erwin, as owner of the original mortgage from Allen to the Wilcoxes, fully discharged the same of record, and surrendered the accompanying notes to Allen.

That Allen had a good and adequate defense in the foreclosure proceedings commenced by the Wilcoxes and Freer to the note and payment alleged to have been assigned to the bank, and that Allen had in fact paid said note before the cross-bill was filed; and at the time the original bill was filed there was nothing due either to the Wilcoxes or the bank, and therefore no authority to file a notice lis pendens, and nothing was gained by filing it, and no one was bound by any notice in consequence of its being filed.

They allege that Allen was induced to allow the cross-bill of the bank to be taken as confessed by the management of Smith, Nims & Erwin who were his counselors and also the solicitors for the bank; that the note held by the bank was never in the hands of the complainant in said original suit, and constituted no part of the subject-matter of such suit and that the filing of the cross-bill was in effect the commencement of a new and independent suit for the purpose of collecting an indebtedness from T. B. & A. B. Wilcox to the bank, which said note was assigned to said bank to secure; and that the defendants to this suit are entitled to the same rights as to said cross-bill that they would have been under an independent foreclosure.

That the bank did not acquire any new rights by filing their

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bill as a cross-bill, and that it could not affect the rights of the defendants without making them parties to its bill as it should have done.

That when the bank filed its cross-bill, Allen, who was made defendant, was only interested as tenant in common with Alpheus Gustin in the lands, each owning an undivided half; that Allen's interest was sufficient in value to more than pay the claim of the bank, and if sold separately, as it should have been, it would not have been necessary to resort to Gustin's interest in order to satisfy the demand of the bank.

That Smith, Nims & Erwin, Allen's solicitors, without his knowledge entered into a secret agreement with Alexander Rogers, who claimed to be a creditor of Allen's, by which they agreed to purchase the decree obtained by the bank, and that David D. Erwin, one of Allen's solicitors, be appointed trustee to transact all the business relating to such purchase, to take the deed in his own name, and to act as trustee for the parties in the proportion of an undivided half to each; and it was under that secret agreement that Erwin purchased the decree, and gave the deed afterwards to complainant. After this agreement, and after Erwin had acquired an interest by assignment of the mortgage given by Allen to the Wilcoxes, and the notes given therewith, he discharged the mortgage of record as fully paid and satisfied, and executed to Allen a release under seal of all claims and demands.

That after Erwin had conveyed to complainant, the latter, fearing that his title was imperfect, and was of an undivided half only, and that the mortgage held by Mrs. Gustin was a valid lien, filed his bill in equity against Erwin and others, who had received the consideration from complainant on his purchase, praying for an injunction until the court should determine whether said title was defective or until Erwin should make it perfect, and that such suit was settled by Erwin and others giving a bond of indemnity for complainant's protection, which bond, it is claimed, is an ample and sufficient protection to complainant against any defects in the title acquired by him from Erwin, and there was therefore no need for complainant to resort to this suit for the protection of his rights, and

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in fact he is but a nominal complainant, and is bringing this suit for the sole use, benefit, and protection of the firm of Smith, Nims & Erwin.

That whatever interest the bank or its assignee Erwin had under said decree against Allen, has been fully paid and settled by the sale of the property and by the subsequent settlement between Allen and Erwin and the release given by Erwin; and that it was not necessary for the bank or for Erwin, its assignee, to resort to the interests of these defendants in the undivided half of the premises, as tenants in common or under the mortgage.

Other allegations need not be particularly mentioned. The answer claims the benefit of a demurrer.

The answer was filed May 13, 1882, and complainant replied to it May 20th. June 30th an order was entered taking the bill as confessed by defendant Stewart, and a like order, August 26th, as to defendant Bannister. On May 31st an order for the taking of the testimony within sixty days was entered by the solicitors for the Gustins, and notice thereof served on complainant's solicitors, who immediately notified the solicitors for the Gustins that the order in that stage of the suit was premature. The Gustins nevertheless proceeded to give notice of the examination of witnesses, and examined several, the complainant not appearing. Immediately after taking the bill as confessed by Bannister complainant gave notice of his election to have the testimony taken in open court, and it was so taken. On motion of complainant the depositions which had been taken for the Gustins ex-parte were suppressed.

On the hearing decree was made quieting the title of complainant as prayed, and perpetually enjoining the foreclosure of the Bannister mortgage by Mrs. Gustin. The Gustins appealed.

I. A question of practice is raised on the order of the court suppressing the depositions taken ex-parte by the defendants. They were suppressed for the reason that when the order for the taking of testimony was entered, the case was at issue

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as to a part of the defendants only, the others not having yet been brought in. The action of the court was undoubtedly correct. No party is at liberty to enter an order for the taking of testimony before a commissioner until after the time for claiming an examination in open court has passed (Rule 47 of Chancery Rules), and that right could not be claimed until the cause was at issue as to all the defendants, or until those who had not answered had been defaulted. *Vermillya v. Odell* 1 Edw. Ch. 617: 4 Paige 121; *Hastings v. Palmer* 1 Clarke Ch. 52. If the depositions could be considered rightfully taken at the time, the subsequent claim, as matter of statutory right, to have the testimony taken in open court, would necessarily preclude their use, and have the effect practically to set them aside.

II. But if the suppressed depositions were to be considered in the case, we are unable to discover that these defendants would be benefited thereby. The purpose in taking them was to establish the allegation that Smith, Nims & Erwin did not deal fairly with Allen, but that, for purposes of their own, they advised him not to make defense to the foreclosure suit of the bank, though he had a defense which would have been effectual, and that when Erwin took an assignment of the decree obtained by the bank and had sale made under it, he did so as trustee for Allen, but afterwards refused to recognize Allen's equities. Allen's deposition is the one by which the fraud is supposed to be made out, but it clearly appears from his own statement that he is in no position to set up a claim of fraud against these parties, for with full knowledge of all the facts, and after they had distinctly refused to recognize the equities claimed by him, he gave them a full release. He pretends duress. "I did this," he says, "because I was forced to do it. There was quite a large amount of personal property on the premises that belonged to me which they even then"—after they had made sale of the real estate in spite of his protest—"refused to release, it being under their control and out of my reach; and having no other means I was forced to execute these papers in order to get this personal property to help myself with." But his evidence shows that there had

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been a controversy lasting for some time, and that any detention of property from him was under a claim of ownership and in denial of his right. The duress therefore consisted in asserting and insisting upon a claim adverse to his, which he by his release acceded to for such consideration as he then saw fit to accept; and this in a legal sense was no duress at all. Cases of duress of goods, under the stress of which a party submitted to exactions which were held illegal, are cited in *Hackley v. Headley* 45 Mich. 569, 574, but none of them would sustain the claim made here. And the vague statement which Allen makes of his rights does not impress one that their basis was either clear or certain.

But a conclusive answer to this part of the case is that Allen makes no attempt to set aside and vacate the arrangement which he claims was fraudulent and forced upon him. It is not in any suit to which he is a party that he complains of duress; but while he complains he acquiesces, and the complaint has therefore no legal significance whatever. A fraudulent settlement is not void; it is only voidable; and that not by a stranger to it, but by the party himself. And duress such as is here set up is only a species of fraud; and a complaint that rests in fault-finding merely, and is not made to the legal tribunals, does not in any manner affect the legal validity of the transaction supposed to be tainted by the fraud, but leaves it in full force.

The claim of defendants appears to be that if Allen had not been defrauded he would have defended the suit brought by the bank, and his defense would have been effectual to prevent a decree in the bank's favor, and would have protected their rights. They were therefore indirectly and incidentally injured by the fraud practised upon Allen, and for that reason have a right to complain of it. But the general rule is that a wrong to one person, though it may be incidentally injurious to another, gives no right to legal redress in favor of the latter unless it was a wrong to him also; and in this case inducing Allen to make no defense could have been no wrong to these defendants, unless two things combined, namely: *first*, that a defense in their

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interest was necessary; and *second*, that it was the duty of Allen to make it for them. And this brings us to a consideration of the notice lis pendens, and of its effect upon the rights of these defendants.

III. The foreclosure suit brought by Theo. B. Wilcox and others against Allen and the Lumberman's Bank was begun April 14, 1874. The defendants in that suit demurred to the bill, and the demurrers were overruled March 6, 1875. Before other proceedings in the case, and on April 13, 1875, Allen deeded an undivided half of the premises to Alpheus Gustin. On May 24, 1875, the defendants filed their answers, and on the same day the bank filed its cross-bill. The notice lis pendens was filed when the original suit was begun, and none was filed on beginning the cross-suit. The claim of the defense is that the cross-suit was only such nominally; that in fact it was an original suit, and the notice of lis pendens which was on file was not therefore constructive notice of it. The reason assigned for this claim is that the so-called cross-bill introduced other and distinct matters into the case. The only question it presented was the amount of the indebtedness of T. B. & A. B. Wilcox to the bank; and this was entirely foreign to the mortgage given by Allen to the Wilcoxes. But this could not be true after one payment of the mortgage had been assigned to the bank as security for its demand. The mortgage and that demand were thereby associated in such a manner that the foreclosure of the mortgage necessarily affected the security of the bank; the bank was a necessary party defendant, and was obliged to put in a defense for its own protection. Had it done so without at the same time asking a foreclosure of the mortgage for the satisfaction of its own demand, it would simply have defeated the suit, leaving its own claim to be enforced afterwards. If it had adopted that course, it would have defeated the Wilcox suit by virtue of its interest in the mortgage which it had as creditor of Allen; and it is very plain, therefore, that the indebtedness of Allen to the bank was not foreign to the mortgage.

But the bank chose not merely to defeat the Wilcox suit,

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but to insist upon a foreclosure on its own behalf; and for this purpose it was necessary to file a cross-bill. This was a further and entirely admissible measure of defense; and any one chargeable with notice of the suit was chargeable with notice of the cross-suit also. The cross-suit was inseparable from the original; both together constituted one cause. *Kemp v. Mackrell* 3 Atk. 812; *Field v. Schieffelin* 7 Johns. Ch. 250; *Cartwright v. Clark* 4 Met. 104, 109. The fact that affirmative relief was asked by the defendant, by the pleading by which in part he made his defense, was unimportant to this question; notice of the suit was notice of all which properly belonged to it.

The notice lis pendens was therefore constructive notice to all the defendants, and charged them with the duty of looking after their interests in the case. The bank or its solicitors were under no obligation to look after them; and though Allen might have defended in the interest of the defendants, it does not appear that he had taken upon himself any legal obligation to do so; or if he had, that the bank or its solicitors were aware of the fact. If his deed to Gustin contained proper covenants of warranty or against incumbrances, he may have become liable upon them by his failure to defend; but a covenant against incumbrances is not a covenant to defend a suit upon an incumbrance, and might or might not, according to the circumstances, charge the covenantor with a moral duty to make such a defense. But a moral duty and a legal duty would not necessarily be coincident.

IV. Defendants insist that the one undivided half of the premises was sufficient to satisfy the mortgage without resort to their half, and that it was the duty of the bank to make sale of Allen's half first. Possibly if the defendants had looked after their interest in the cross-suit, they might have obtained a decree to that effect; but they failed to do so, and the decree which was entered warranted the sale made.

Defendants also claim that Erwin, in his purchase of the decree from the bank, and in his dealings with the property afterwards, was guilty of a fraud upon the bank, toward

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which he stood in confidential relations. If he was, the fact concerns the bank, but not these defendants.

The tax deeds, in the view we take of the case, are unimportant. No error is found in the decree, and it must be

Affirmed.

CAMPBELL and SHERWOOD, JJ. concurred, CHAMPLIN, J. not sitting.

FLORA B. HANEY, BY WILLIAM A. CHAPPELL AS NEXT FRIEND, AND JOEL CLEMENS v. DAVID M. ROY.

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Estoppel from relying on stipulation—Patent inuring to mortgagee's benefit.

The purchaser of land paid part of the purchase price and for the rest gave notes secured by a mortgage on the land. Indorsed on the mortgage was a stipulation that it should not be foreclosed until the mortgagee had removed all clouds on the title. The land was part of a railway grant which reverted to the Government and was released by Congress to the State. During his occupancy the purchaser obtained a deed from the railway company to strengthen his title, and when the holders of the mortgage sought to remove the cloud, as they did at the earliest opportunity, he refused to permit them to do so in his name, and the attempt failed in consequence. Meanwhile, relying on his two deeds and his possession, he took a patent to it himself as pre-emptioner. *Held*, on a bill to foreclose that he was estopped from relying on the stipulation, as he had tried to prevent its fulfilment; *also*, that his patent inured to the benefit of the mortgagee, the more so, as the mortgagee's deed enabled him to obtain it.

Appeal from Muskegon. (Russell, J.) June 25.—September 23.

FORECLOSURE bill. Complainants appeal. Reversed.

J. W. & O. C. Ransom for complainants. A title subsequently acquired by the mortgager inures to the benefit of the mortgagee by virtue of the covenants in his mortgage, and is subject to foreclosure; and even a subsequent purchaser from the mortgager under his after-acquired title, having notice of such mortgage, stands in no better position

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than the mortgager himself: *Tefft v. Munson* 63 Barb. 31; *Hitchcock v. Fortier* 65 Ill. 239; *M'Crackin v. Wright* 14 Johns. 194; where one having a claim to land in Missouri, under a Spanish grant, made a mortgage, and afterwards Congress confirmed the claim, it was held that the confirmation inured to the benefit of the mortgagee rather than to the benefit of his heirs solely: 1 Jones Mort. § 679; *Massey v. Papin* 24 How. 362.

Cook, DeLong & Fellows for defendant.

CHAMPLIN, J. We find the facts so well stated in the brief of complainants that we adopt them in this opinion:

"On the 9th day of September, 1867, Augustus D. Griswold and wife conveyed by warranty deed to Mary A. Haney the N. E. ¼ of the S. E. ¼ of section 9, in town 9 N., of range 16 W. Mary A. Haney conveyed the same premises by warranty deed to Hiram H. Haney, on the 12th day of January, 1869, who soon thereafter went into possession of and cultivated the same and built a house thereon, in which he resided with his family until he sold and conveyed the said premises to the defendant, David M. Roy, as hereinafter stated. On the 29th day of April, 1872, Hiram H. Haney sold and conveyed said premises by warranty deed to the defendant, David M. Roy, and at the same date Roy executed and delivered to Hiram H. Haney his promissory notes for the sum of $700; also a mortgage on said premises for that amount to secure that amount of the purchase price. The notes and mortgage were reduced by payment by Roy, from time to time, down to the sum of $400, represented by promissory notes, four in number, of $100 each, payable as follows: One payable January 1, 1874; another, January 1, 1875; and another, January 1, 1876; and another, January 1, 1877,—with interest at 7 per cent. per annum, from date, until paid.

This bill is filed to foreclose the mortgage in default of the payment of the above amount, with the interest thereon. Upon the margin of the mortgage is indorsed the following memorandum: 'In consideration of the sale of the said premises to the said David M. Roy, and the sum of one dol-

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lar, the receipt whereof is hereby acknowledged, I hereby expressly agree with said Roy that I, my heirs, executors, administrators and assigns, will not foreclose this mortgage until I shall have first removed all clouds on his title to said premises,'—and is signed by the said Hiram H. Haney. The first two notes accompanying the mortgage were paid after the execution of this memorandum, leaving $400 of the principal sum unpaid, as before stated. On the 28th day of March, 1874, Hiram H. Haney assigned the mortgage and the four notes remaining unpaid to Isabella Haney, his wife, who thereafter was the owner thereof. After such assignment, and on the first day of April, 1874, Hiram H. Haney died at the township of Leighton, Allegan county, Michigan, leaving his widow, Isabella Haney, and the complainant, Flora B. Haney, his only child him surviving, and no other heirs. Isabella Haney (widow of said Hiram H. Haney, and mother of complainant, Flora B. Haney) died on the 21st of February, 1881, at the same township and in the same county last named, leaving her daughter, complainant Flora B. Haney and complainant Joel Clemens, who was the husband of said Isabella Haney at the time of her death, and one other child, of the age of two years, of her begotten by complainant Joel Clemens, her husband, her surviving, and no other heirs. The child last named died soon after the death of its mother, and a little more than a year before the commencement of this suit, so that complainant Flora B. Haney, her daughter by her first husband, and Joel Clemens, her husband at the time of her death, were her only heirs. The said Isabella Clemens (formerly said Isabella Haney) died, being the owner and possessed of said mortgage and notes, and left no debts whatever, or other claims against her estate. The said Flora B. Haney and Joel Clemens, therefore, are now the owners of said notes and mortgage, and bring their bill in this case to foreclose the same. The defendant, Roy, upon receiving conveyance of the land, and executing and delivering the mortgage and promissory notes, went into possession of the premises, and from that time forth has cultivated and enjoyed the same by virtue thereof.

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The mortgaged premises are a portion of the 'Detroit & Milwaukee Railway Company lands,' so called, referred to in Act No. 275 of the Session Laws of 1881. This appears to have been understood by the parties at the time of the conveyance by Haney to defendant, and at the time of the execution of the mortgage and notes by defendant to Haney, and the memorandum on the margin of the mortgage probably arose from an uncertainty as to the outcome of the title to these lands, derived through Griswold, Bowes and others who at different times claimed to own the same. It is unnecessary to go into a history of the difficulty in the title of these men, any further than to refer to the cases of *Bowes v. Haywood* 35 Mich. 241; *Fenn v. Kinsey* 45 Mich. 447. These decisions held that the conditions attached to the grant to the State of these lands for railroad purposes, by act of Congress of June 3, 1856, and attached to the act of the Legislature of the State of Michigan of February 14, 1857, by which the lands were ceded to the railroad companies therein named, had not been complied with, and that the United States had still a reversionary interest in them. As a result of these decisions, the Congress of the United States on March 3d, 1879, released to the State of Michigan the reversionary interest of the United States in these lands. 20 U. S. Stat. at Large 490. And, after this act of Congress, the State of Michigan confirmed to actual settlers on the lands referred to the titles derived from the persons above named upon payment to the State of the nominal sum of ten cents per acre, and releasing to the State all claims for taxes thereon. Act No. 275 of 1881.

It will be seen that the passage of the last-named Act of Congress, and of the last-named Act of the Legislature of the State, afforded the first opportunity complainants had of removing the cloud upon defendant's title to the mortgaged premises. Accordingly, on or about the 14th day of February, 1882, William A. Chappell, the general guardian of complainant, Flora B. Haney, applied to the defendant for the right to make, in the name of the defendant, an application under said act to the commissioner of the general land-office

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of the State for a patent to said defendant from the State for such mortgaged premises, or that the defendant should himself apply under the act for such patent, and he, said William A. Chappell, in the interest of complainants, would pay the expense thereof, and then and there offered to procure to be removed all clouds from the title to said premises without expense to defendant; but defendant refused to accede to such request, saying he should pre-empt said land as a settler thereon.

But nevertheless, Mr. Chappell, as such guardian, made such application on or about the 16th day of February, 1882, to the commissioner for a patent to defendant under said act. In such application it became necessary by the provisions of the act as construed by the commissioner, to procure from defendant a relinquishment in writing by him to the State of all claims for a rebate of taxes which he had paid upon the premises, and for that purpose he applied to the defendant, on or about February 27, 1882, for such relinquishment, to enable him to perfect such application, but he refused so to do. Application, however, was made by the guardian, with the means at his command, but failed. Nevertheless, the defendant himself afterwards made application for said patent, and the same was issued to him under the act, by reason solely of his possession of the premises, derived from Hiram H. Haney under the conveyance thereof to him by said Haney, which patent bears date February 28, 1882."

The defendant is estopped by his own conduct from asserting that complainants have not complied with the memorandum endorsed on the mortgage by removing all clouds on the title before the mortgage should be foreclosed. He refused to permit his name to be used in the application for a patent under the legislation enacted to quiet titles to the lands of which these formed a part. He refused to sign a relinquishment of the taxes made necessary under the Act, and the rulings of the Land Department of the State of Michigan. He refused to furnish a deed in his possession, which was deemed necessary to perfect the application under the Act of

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1881. He thus prevented the complainants from obtaining a patent to him from the State, by which all clouds upon his title to the premises would be removed. The defendant, on the 4th day of September, 1874, of his own volition, obtained a deed from William R. Bowes, trustee of the Port Huron & Lake Michigan Railroad Company, which purports to be for the consideration of fifty dollars. He thus held two of the titles referred to in Act No. 275 of 1881, which gave him preference over the holder of any one title, if any there should be. He obtained a patent from the State bearing date February 28, 1882, for which he paid four dollars. This patent inured to the benefit of the mortgagee upon well-settled principles of law. 1 Jones on Mortgages § 679; *Tefft v. Munson* 63 Barb. 31; *Hitchcock v. Fortier* 65 Ill. 239; *McCrackin v. Wright* 14 Johns. 194; *Massey v. Papin* 24 How. 362.

Besides, his right to a patent accrued under the title and possession he obtained through the Griswold deed, as well as under the Bowes deed, and the title through the Griswold deed was just as efficient for the purpose of obtaining the patent as if no deed from Bowes had been obtained. The complainants state in their bill of complaint that they are willing to allow defendant the fifty dollars paid for the Bowes deed and the four dollars paid the State on obtaining the patent and also all other necessary expenses in obtaining the same. There is nothing appearing in the record that shows any other expenses were incurred, and therefore nothing can be allowed therefor.

The decree of the circuit court must be reversed, and a decree of foreclosure entered, in accordance with the prayer of the bill, for the amount due on the four promissory notes stated and set forth in the bill, less fifty dollars and interest thereon at seven per cent. from September 4, 1874, and four dollars and interest thereon at seven per cent. from February 28, 1882; complainant to recover costs of both courts.

The other Justices concurred.

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CHARLES C. COMSTOCK v. CITY OF GRAND RAPIDS.

Taxation of freight cars—Complaint of assessments.

1. The owner of railroad cars is not exempt from taxation thereon on the ground that the companies over whose roads they run pay taxes on their earnings.

2. The statutory rule for taxing a car-loaning company or the owner of a special freight-line (How. Stat. § 1229) does not apply to the owner of cars that are used in his own business, even though the railroad company over whose road they run makes the owner an allowance for "wheelage."

3. A manufacturer lived in one ward and had a warehouse and stock-in-trade in another, and he also had a number of railway cars which he used in the transportation of his manufactures. The cars were taxed in both wards. *Held*, that they were properly taxable with the stock-in-trade as appurtenant to the business; and as personal property is assessable in gross and specific description of it is surplusage, the enumeration of the cars on the tax-roll could not affect the validity of the assessment, and if it was excessive the owner's remedy was by appeal to the board of review and not by a suit to recover taxes paid under protest.

Error to the Superior Court of Grand Rapids. (Parrish, J.) June 25.—September 23.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Everett D. Comstock for appellant.

J. W. Ransom for appellee.

COOLEY, C. J. Plaintiff sued the city of Grand Rapids to recover the amount of certain taxes assessed against him for the years 1879, 1880, 1881 and 1882, and which he had paid under protest. The suit was brought in the Superior Court of Grand Rapids, and was tried by the judge without a jury. The following are the findings:

FINDING OF FACTS.

1st. During the years 1879, 1880, 1881 and 1882 the plaintiff was, and still is, a resident, inhabitant and citizen of the

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Fifth ward of the city of Grand Rapids, and owned and carried on a large manufacturing establishment in said Fifth ward, in which he manufactured pails, tubs and other articles.

2d. That during all the time aforesaid he owned and occupied for business purposes a warehouse near the Central Railroad depot, in the First ward of said city, wherein he stored temporarily his manufactured articles for the purpose of convenient shipping.

3d. For the convenience of the plaintiff, and for its own profit, the Michigan Central Railroad Company had laid a track from its own road along and near the warehouse of the plaintiff, to facilitate the shipping of the wares and other manufactures of the plaintiff, so that cars could be run to and loaded at and from the said warehouse of the plaintiff.

4th. In connection with the said warehouse was an office used by the plaintiff, on which was a sign consisting of the plaintiff's name.

5th. The plaintiff was the owner of twenty (20) cars, which were used and employed by him exclusively for the purpose of shipping his manufactures to various parts of the world. These cars were run upon the track to the warehouse of the plaintiff, and loaded with the plaintiff's wares, and, by an arrangement with the several railroad companies, transported to such points and places as the plaintiff desired; the plaintiff paying to the railroad companies freight charges, and the railroad companies paying to the plaintiff what they called wheel mileage.

6th. The products of the plaintiff's manufacturing establishment, in the Fifth ward, were conveyed to the aforesaid warehouse of the plaintiff in the First ward, in wagons used for that purpose, and sometimes the plaintiff's cars were loaded directly from the wagons, and sometimes from the said warehouse.

7th. In the years 1879, 1880, 1881 and 1882 the supervisor of the First ward listed and assessed these railroad cars, owned by the plaintiff, with other personal property of the plaintiff in said First ward, for the purpose of taxation, and made due return of his tax-rolls.

8th. The assessment rolls of the county, with the cars listed and assessed thereon, came before the board of review of the city of Grand Rapids, and were affirmed, and the taxes thus assessed were collected for the several years named, and the amount belonging to the city was paid into the city treasury.

9th. The taxes paid by the plaintiff, as above specified,

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were paid by him under protest before any proceedings had been taken for their collection.

10th. For the year 1882, after these cars had been assessed by the supervisor of the First ward, as usual, at the suggestion of the plaintiff, they were also assessed with other personal property of the plaintiff by the supervisor of the Fifth ward, of which the plaintiff was an inhabitant, and the tax thus assessed was paid by the plaintiff in both wards, under protest, before any proceedings were had for the collection of the tax.

11th. The amount paid by the plaintiff was substantially as stated in the bill of particulars in this case.

FINDINGS OF LAW.

1st. I find as a matter of law, upon the facts in this case, the plaintiff has no cause of action against the defendant, the city of Grand Rapids.

2d. That judgment must be entered in favor of the defendant against the plaintiff for costs of suit, to be taxed.

The plaintiff requested the trial judge to make certain amendments of his findings of facts, the most of which, as we view the case, were immaterial. One of these was that the cars were out of the city more than half the time, and that when in the city were some of the time in other wards than the First ward. Another was that the Grand Rapids & Indiana Railroad Company, in making to the Auditor General its report of earnings for the purposes of taxation, did not exclude the earnings by these cars, and paid taxes upon such earnings.

Plaintiff claims to recover in the case upon the grounds.

1st. That the cars were not assessable to him for taxation at all; and

2d. That if so assessable it must have been in the Fifth ward of the city, which was the ward of his residence.

I. It is said that the railroad companies pay a tax in respect to these cars, and for that reason they cannot be assessed for taxation to the owner, since that would be duplicate taxation and a violation of the constitutional rule of uniformity.

This argument is based upon a fallacy. The railroad com-

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panies pay no tax upon those cars. They pay a tax in respect of their earnings. Their earnings may be increased by the use they make of these cars, but that does not make the tax upon the increased earnings a tax upon the cars. The earnings are also increased by the carriage of particular articles of freight, but the tax upon the earnings is not a tax upon the freight, so as to entitle the owners of the freight to exemption from taxation. It is a mistake to suppose there is any duplicate taxation in the case; the railroad pays a tax in respect of its business, and the owner of the property which it carries or which it uses pays a tax in respect to the property; and the two taxes are distinct and levied on wholly different principles.

II. It is further said that the plaintiff, if taxable at all in respect of these cars, is only subject to the specific tax imposed by Act No. 173 of 1873, the second section of which is as follows:

"Every corporation, association, or co-partnership, or party owning, running, or being interested in any 'special,' or 'fast,' or 'through,' or 'colored,' or other freight line (not owned exclusively by railroad companies), or any car-loaning company doing business in this state, or running cars over any of the railroads in this state, shall, on or before the first day of February of each year, pay to the state treasurer, on the statement of the auditor general, an annual tax of two per cent. upon its gross receipts earned in this state and derived from loaning, renting, or hiring its cars to any railroad, or other corporation, or association, or co-partnership, or party." How. Stat., § 1229.

The mere recital of this section is sufficient to show that the plaintiff's case is not within it. He is interested in no freight line; he is not running cars over any railroads in this State; he is not in the receipt of earnings derived from loaning, renting or hiring his cars to any railroad or other corporation or association or co-partnership or party. It would be impossible, therefore, to tax him under the section recited. The plaintiff owns cars, it is true, but not for loaning, renting or hiring out, and not for doing business with them over railroads. He owns them to load with his own

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merchandises, and then to be moved for him by railroad companies for such compensation as may be agreed upon. It is true that in fixing the compensation, allowance is made to him for "wheelage," as allowance might be made by a mechanic for tools furnished by his employer for use in his service; but such an allowance is not earnings from loaning, renting or hiring the cars, for they are neither loaned, rented nor hired.

The cars, then, were undoubtedly assessable to the plaintiff for taxation by value. It remains to see whether the taxation was void, because made in the First ward, which was not the ward of the plaintiff's residence.

III. The plaintiff is quite correct in his contention that personal property should be assessed to the owner for taxation in the township or other assessment district in which he resides, unless the statute otherwise provides. The statutes of this State make some exceptions, and the one which has importance in this connection is the following: "All goods, wares, and merchandise, or stock in trade, including stock employed in the business of the mechanics' arts, in any township other than where the owner resides, shall be taxed in the township where the same may be, if the owner hire or occupy a store, mill, shop or warehouse therein, and shall not be taxable where the owner resides." How. Stat. § 1008, subd. 1. "Township," as here used, includes "ward." Id. § 1013.

The plaintiff argues that his cars were neither "goods, wares or merchandise, or stock in trade" within the meaning of this section. He was not making cars, or keeping them in stock, or dealing in them. He was merely keeping a certain number for his own use. Therefore, the assessor of the ward in which he did not reside had no jurisdiction to assess them.

But it does not follow that because they ought not to have been assessed in the First ward the assessment was void. Personal property is not, according to the system which prevails in this State, assessable on specific enumeration, but it is assessable in gross, and specific descriptions are mere surplusage. In this case it appears beyond question and is not

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disputed that the plaintiff was assessable for personal property in the First ward of the city. He had a warehouse and an office there, and he had stock in trade. It was entirely right and proper therefore to put him upon the roll for taxation in that ward, and there was and could have been no want of jurisdiction in doing so. The error on the part of the assessor, if there was any, was in including these cars as part of the "goods, wares or merchandise, or stock in trade," which was taxable in that ward.

If the assessment had been made of the goods, wares, etc., in one gross sum, without any specification of particulars, there could have been no question whatever that the assessment would have been valid, and that the plaintiff, in order to obtain relief from any portion thereof, must have appealed to the board of review as provided by statute. This must be considered settled by *Williams v. Saginaw* 51 Mich. 120. But the mention of the cars for separate valuation can make no difference. The plaintiff knew, or was bound to know, that the law required that he should be taxed for personal property in the First ward of the city, and he therefore had constructive notice of the assessment actually made, and should have appealed in respect to any part of it of which he could justly complain. There is no analogy between this case and the case of one who is assessed in a township where he has no taxable property at all, and with whose assessments he is therefore not concerned. The assessment in such a case would be void for want of jurisdiction, while here, if the plaintiff is correct in supposing he was not taxable in the Fifth ward, it was merely excessive. But we think the cars may properly be considered as appurtenant to the business in connection with which they were used, and taxable with the stock in trade.

On the undisputed facts in the case, therefore, the plaintiff was not entitled to recover. If any errors occurred in the course of the trial they are immaterial.

The judgment must be affirmed.

CAMPBELL and SHERWOOD, JJ. concurred, CHAMPLIN, J. not sitting.

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SETH HOLCOMB v. LE ROY TIFT.

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Justice's courts—Judgment for joint debt—Transcript in evidence—Presumption in favor of certificate—Merger of debt in judgment.

1. The judgment to be rendered in justice's court on a joint debt when only one defendant is served is prescribed by statute, and the use of the word "defendant" instead of "defendants" in rendering judgment is a mere clerical misprision and leaves the judgment if not taken up for review, valid as against the defendant who was served.
2. A transcript of a justice's judgment is admissible as evidence though certified by another justice, if his certificate shows that he had possession of the docket of the justice who rendered the judgment.
3. It is presumed that a particular justice of the peace is the one who certified a transcript if his name is signed, as justice, to the certificate.
4. A justice's judgment, though joint in form is not in law a joint obligation binding both defendants alike, if only one was served, and it does not merge the debt so as to preclude suing both over again. The one who was not served is not personally bound, and cannot be until he is sued on the original obligation. The judgment therefore may be sued as an individual obligation against the one who was served and the case may be discontinued as to the other.

Error to Newaygo. (Fuller, J.) June 25.—Sept. 23.

ASSUMPSIT. Defendant brings error. Affirmed.

George Luton, for appellant, cited as to joint suits, *Winslow v. Herrick* 9 Mich. 380; *Ballou v. Hill* 23 Mich. 60; *Anderson v. Robinson* 38 Mich. 407; *Detroit v. Houghton* 24 Mich. 459.

Wm. Wisner Taylor, for appellee, cited *Munn v. Haynes* 46 Mich. 141; *Taylor v. Dansby* 42 Mich. 82; *Reading v. Beardsley* 41 Mich. 123.

CAMPBELL, J. This suit was originally brought on a justice's judgment upon a cause of action against Jerry Mason and Le Roy Tift. Tift was the only defendant served. The justice, in rendering judgment, seems to have used the word "defendant" instead of "defendants." But inasmuch as

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the statute provides what judgment shall be rendered on joint debts where only one party is served, this is a mere clerical misprision, and the judgment, not having been taken up by certiorari or appeal, must stand as a valid judgment for all purposes against the defendant who was served. *Allen v. Mills* 26 Mich. 123; *Zimmer v. Davis* 35 Mich. 39.

The present action, being assumpsit on that judgment, was brought, at first against both parties, but discontinued as to Mason, and carried to judgment against Tift. Objection was made to the transcript of the earlier judgment, because it was made by another justice, and because it was claimed to be defectively proved. This objection is not well taken. It was certified by a justice, who showed by his certificate that the docket was in his possession. And we must presume that the William H. Hicks who was shown to be a justice, is the person who, as such, certified the transcript. *Facey v. Fuller* 13 Mich. 527.

We think there was no error in allowing judgment in the present case against Tift alone. The old judgment, although joint in form, was in no legal sense a joint obligation binding both alike. It bound Tift, but it did not conclusively bind Mason. It did not merge the debt on which it was founded, so as to preclude its being sued over against both. *Bonesteel v. Todd* 9 Mich. 371. It was never binding on Mason personally. Id.; *Goebel v. Stevenson* 35 Mich. 185; How. Stat. § 6943. Any proceeding against Mason, in order to bind him, would have to be on the original obligation, whether nominally on the judgment or not. *Oakley v. Aspinwall* 4 N. Y. 514. It was proper, therefore, to treat this judgment, in an action of assumpsit on it, as Tift's individual liability, on which he alone was personally liable, and the discontinuance against Mason was proper and worked no harm to any one.

The judgment must be affirmed.

CHAMPLIN and SHERWOOD, JJ. concurred. COOLEY, C. J. did not sit.

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DAVID HIRSHFIELD v. LEONARD A. WALDRON.

Payment to employee.

Presentation of a bill by a merchant's employee does not warrant the debtor thereon in paying it to him unless it is within the scope of his employment to receive payment; and his mere statement that he is authorized to receive it is not enough, nor is it enough that the bill is in the merchant's handwriting and on one of his bill-heads.

Error to Muskegon. (Russell, J.) June 25.—Sept. 23.

ASSUMPSIT. Plaintiff brings error. Reversed.

Stephen H. Clink for appellant.

Cook, DeLong, Fellows & Fellows for appellee.

CHAMPLIN, J. Plaintiff was engaged in business as a retail dealer in clothing, in the city of Muskegon. Three doors from him on the same street the defendant was engaged in business as a retail dealer in boots and shoes. The parties had business transactions with each other, which resulted in an action brought by plaintiff against defendant to recover the value of goods sold and delivered. Defendant pleaded set-off. A trial was had which resulted in a judgment for plaintiff, from which defendant appealed to the circuit court. On the trial in that court the defendant admitted the items of plaintiff's claim as established at the sum of $68.75. The defendant introduced evidence to establish his set-off, and the only contention is over an item in defendant's bill of set-off of $20 as cash paid to plaintiff. The evidence showed that in 1881 the plaintiff and Moses Hirshfield were co-partners doing business under the firm name of D. & M. Hirshfield; that the first part of the year 1882 Moses Hirshfield bought out David's interest in the firm assets and conducted the business alone for one year, when he sold out to plaintiff all the assets, including book-accounts and credits. The plaintiff and Moses both testified that while doing business in the firm name of

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D. & M. Hirshfield they never authorized any clerk or person in their employ to receive any payment from Mr. Waldron on account, and that they never received the $20 in dispute.

On cross-examination plaintiff testified that a bill of goods produced by defendant, and made out under the bill-head of D. & M. Hirshfield against defendant, was in the hand-writing of Moses Hirshfield. He also testified that Barney Ash was in the employ of D. & M. Hirshfield on the 13th day of December, 1881, but in what capacity or what authority he had was not asked him, and does not appear from his testimony. The defendant testified that on the 13th of December he charged on his blotter; "Hirshfield to cash $20, paid to man;" that the bill in Hirshfield's hand-writing was on that day brought into his store by Barney Ash, a clerk in the employ of D. & M. Hirshfield, who said he was sent there by Mr. Hirshfield to get some money, and that he gave him $20 and entered it on his book, and that the entry was made right along in the ordinary course of his business, and that he also made an entry upon the bill at the same time. He was asked by his counsel:

"And you paid it because you thought this bill came from Hirshfield?"

Answer. "Yes; I knew it because the bill was on Mr. Hirshfield's bill-head. I have often sent my man out to collect money."

On cross-examination he testified, as follows:

Question. "You say you paid Barney Ash $20 in cash on the 13th of December, do you?"

Answer. "Yes, sir."

Q. "Did you ever have any authority from either of the Hirshfields to pay Ash any money?"

A. "Nothing more than I had that bill when he came in with it."

Q. "That is all the authority you had?"

A. "I had that for authority."

The foregoing, as appears from this record, is all the evidence offered tending to prove the authority of Barney Ash to collect or receive the $20 in question. The counsel for

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plaintiff, at the close of the testimony, moved the court to strike out the item of $20 cash paid to Ash, for the reason that the defendant himself said that he had no authority but what was on the bill, and that constituted no authority. The court refused the motion, and charged the jury that it was necessary for them to find, from all the circumstances surrounding the case, that the party to whom Mr. Waldron paid it was fairly authorized to receive it. If they found that, it was enough.

The only ground upon which this item can be sustained as a set-off is that Ash was an agent of plaintiff, and was authorized to receive the money upon the bill. In the absence of proof of actual authority, the agent's statement as to his authority is not binding upon his principal. The statement made by Ash to defendant, when he presented the bill, was no evidence of authority from Hirshfield to him to collect the money. The fact that the bill was made out in the handwriting of Mr. Hirshfield, and upon the bill-head of the firm, was not evidence of Ash's authority to collect money upon it. *Kornemann v. Monaghan* 24 Mich. 36; *Grover & Baker Sewing-machine Co. v. Polhemus* 34 Mich. 247; *Reynolds v. Continental Ins. Co.* 36 Mich. 131; *McDonough v. Heyman* 38 Mich. 334.

The testimony relative to Ash's connection with plaintiff, or with the firm of D. & M. Hirshfield, was simply to the extent that he was employed by them as clerk. No attempt was made by defendant to prove that he had ever collected money upon bills before or after, or that he had anything to do with the book-keeping or financial part of plaintiff's business. Where the servant's authority to bind his master arises by implication merely, the general rule is that the authority of the servant is co-extensive with his usual employment, and his authority is to be measured by the scope of his employment. The usual employment of a clerk in a retail store is to sell goods to customers or purchasers, and it is implied from such employment that he has authority to receive pay for them on such sale. But there is no implication from such employment that he has authority, after goods are delivered

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and taken from the store, to present bills and collect money due to his employers, because it is not in the scope of the usual employment of such clerks. To have bound the plaintiff in this suit by the acts of the clerk, it was incumbent upon the defendant to prove the usual employment of Ash, and if the act of collecting money upon plaintiff's accounts was within the scope of such employment, his authority would have been implied, and the plaintiff bound thereby. The motion of the plaintiff should have been granted.

The judgment is reversed and a new trial granted.

The other Justices concurred.

GEO. L. DAVIS AND SUMNER D. DAVIS v. ABRAHAM BERGER.

Partner's authority to submit to arbitration—Acknowledgment of submission—Arbitrator's oath.

1. A partner can bind his firm by a submission to arbitration if expressly authorized to do so, and an award based on such submission may be good at common law. His authority can be proved if questioned, and an acknowledged power of attorney is unnecessary
2. The oath of arbitrators does not have to be in writing.
3. Joinder of partners in suing out a writ of error to review the judgment on an award against the firm has the effect of affirming the authority delegated to one partner to submit to arbitration.
4. An acknowledgment of voluntary submission to a common-law arbitration is irregular if not made until after the arbitrators have begun their work; but if made before they have finished, it may be allowed for the purpose of sustaining a statutory judgment on the award. And it is not invalidated by being under oath.

Error to Ingham. (Gridley, J.) June 25.—Sept. 23.

Proceeding for judgment on award. The parties moving for judgment bring error. Reversed.

M. V. & R. A. Montgomery for appellant. Awards have been sustained in Michigan where the agreement for arbitra-

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tion was signed by one member of the firm: *McArthur v. Oliver* 53 Mich. 299; and it is held in Pennsylvania that one partner can bind his co-partners by an unsealed agreement for arbitration: *Taylor v. Coryell* 12 S. & R. 248; also in Illinois: *Hallack v. March* 25 Ill. 50; also in Ohio: *Wilcox v. Singletary* Wright (O.) 420.

Huntington & Henderson for appellee. One partner cannot bind his co-partner by an arbitration agreement without special authority for that purpose from his co-partner: *Buchoz v. Grandjean* 1 Mich. 367; *Backus v. Coyne* 35 Mich. 5; *Harrington v. Higham* 13 Barb. 660; arbitrators must be sworn before they receive evidence or no judgment can be entered on their award: How. Stat. § 8478; *Gibson v. Burrows* 41 Mich. 713; *Vanderhoof v. Dean* 1 Mich. 465; Colwell on Arb. 101; Watson on Awards, 65.

CAMPBELL, J. This is a writ of error to review the action of the circuit court for the county of Ingham in refusing to confirm an award, and in setting it aside as irregular.

The agreement to arbitrate was signed by defendant, and by George L. Davis, one of the plaintiffs, on behalf of the firm in which both are partners. It provided for a statutory arbitration to be put into judgment in the court before mentioned, and to be had by two persons named and a third to be chosen by the two. The board was regularly made up, and all the steps taken seem to have followed the stipulation. The award was filed, and a motion made on the one side to give judgment on it, and on the other side to vacate it, both as unauthorized under the statute, and also for special reasons, which were that it was not executed by all the arbitrators together, and that it was fraudulent, inasmuch as plaintiffs had admitted their indebtedness to defendant, and yet had obtained an award of between $800 and $900 against him.

It appeared distinctly that the final execution of the award was by all three together, and that it was their unanimous action when met together, although by an oversight two originally signed the paper, which contained what all had agreed upon, in the absence of the third. The alleged admissions of plaintiffs were not only denied by counter-affidavits, but the matters were the very things submitted to the arbitrators,

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and settled by their finding. There can be no doubt that the award is a good common-law award, and binding upon the parties, unless the fact that it was not directly executed by both partners vitiates it.

It has been held that there is no presumed authority in one partner to submit matters to arbitration. This rule has been recognized in this State, where it was first laid down in *Buchoz v. Grandjean* 1 Mich. 367. But it has not, so far as our rulings go, been questioned that one partner may have special authority given him to bind his firm by such a submission; and the record in this case contains an uncontradicted showing under oath that such authority existed here. If so, there is no reason why it should not be sustained at common law. It was therefore error to set the award aside. Whether it authorized a judgment under the statute is a different question.

The only statutory defects which have been much relied upon are the absence of a legal acknowledgment of all the parties, and the absence of any return of an oath by the arbitrators. So far as the oath is concerned, the fact appears that they were regularly sworn, and the statute does not in terms require this to be in writing. We do not think this point well taken. Neither is it necessary, if authority existed in the managing partner, that it should appear on the record in the shape of an acknowledged power of attorney. It was held in *City of Detroit v. Jackson* 1 Doug. (Mich.) 106, that where a submission was acknowledged by a person claiming to be agent, the authority need not be set forth in form, but the fact might be established if questioned. And while, without such authority, the principal could not be bound, yet the question might be raised by error in fact, provided judgment was entered on the award. If not raised in some way the court might properly enter judgment, which would bind the principal, if appearing, or if actually giving the authority.

In the present case there was an affidavit of authority not disputed, and both plaintiffs have sued out this writ of error, which is also an affirmance of the authority.

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It expressly appears that no acknowledgment was made until some time after the arbitrators began their work. But then, upon the 12th of January, 1884, both the managing partner of plaintiffs and the defendant made acknowledgments, which were given under oath in the form of affidavits before persons authorized to take acknowledgments of deeds. Each swore that the submission was entered into voluntarily for the purposes expressed, and there can be no question of the sufficiency of this unless the fact of its being under oath deprives it of efficacy. There seems to be no good reason why an acknowledgment under oath may not be as good as any other. The main purpose of a certificate of acknowledgment is to show that the maker of an instrument desires to give it credit as his own by solemn declaration before an acknowledging officer. All this appears here, and we think sufficiently.

It would have been better if this paper had been acknowledged in the first place. But the statute only requires this acknowledgment as formal evidence to justify the court in rendering judgment without regular process, upon agreement of the parties. It was made before the final action of the arbitrators, and for the express purpose of curing a mistake or omission. When the parties intervened in this way it must have been for the purpose of perfecting the proceedings and authorizing them to be completed so as to sustain a statutory judgment. The arbitrators proceeded subsequently to complete their investigations and deliberations. We do not think the statute stands in the way of an acknowledgment made under such circumstances; and in our view, it has been substantially complied with.

While all purely statutory proceedings must show all done which the statute makes necessary, yet it has been regarded as not only proper, but desirable, for parties to settle their disputes amicably, and arbitrations are favored rather than discountenanced. Where, as here, the submission, before it was finally acted on, was, with knowledge of all the facts, deliberately sanctioned and acknowledged, in order to induce both parties and arbitrators to complete it, we ought not to refuse to sanction it, unless the omission puts the papers

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beyond any fair construction of the law. We think it is within the letter of the law, as it clearly is within its spirit.

The result must be the reversal of the action of the circuit court, and the entry here of judgment on the award, with arbitrators' expenses and other costs.

SHERWOOD and CHAMPLIN, JJ. concurred. COOLEY, C. J. did not sit in this case.

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6. How. Stat. § 8974 gives costs to the plaintiff only if he recovers on any count of a declaration where all are for the same cause of action; where otherwise, to defendant also, if he recovers on any count. A woman helped turn a man off her husband's premises, and he

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3. Act 148 of 1883 requires one who takes an appeal from a justice to pay, on taking it, the fee due to the clerk of the appellate court. *Held*, in a case in which this was not done at that time, but where the fee was paid when the justice's return was made, that the appellate court had discretion to refuse to dismiss the case for non-compliance with the statute. *Preston v. Wayne Circuit Judge*, 242.
4. Dismissal of an appeal on the ground that appellees had had no notice of the settlement of the case, was *denied* where it appeared that it was settled in good faith, and that they knew of the proceedings and might have appeared. *Stickle v. Haskins*, 130.
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1. A partner can bind his firm by a submission to arbitration if expressly authorized to do so, and an award based on such submission may be good at common law. His authority can be proved if questioned, and an acknowledged power of attorney is unnecessary. *Davis v. Berger*, 652.
2. An acknowledgment of voluntary submission to a common-law arbitration is irregular if not made until after the arbitrators have begun their work; but if made before they have finished, it may be allowed for the purpose of sustaining a statutory judgment on the award. And it is not invalidated by being under oath. *Id.*
3. The oath of arbitrators does not have to be in writing. *Id.*
4. Joinder of partners in suing out a writ of error to review the judgment on an award against the firm has the effect of affirming the authority delegated to one partner to submit to arbitration. *Id.*
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3. In an action for rent of a right of way over land to which defendant claimed equitable title, it is proper to show that defendant had told one of his own tenants that he had the right to use the premises for passage; and if the purpose of such evidence is merely to show that defendant used the premises and obtained the right to use them from the plaintiff, it is immaterial whether the lease was or was not in writing, and the testimony is not open to the objection that the lease itself is the best evidence. *Id.*
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1. The powers of a circuit judge, in a collateral proceeding before him at chambers to dissolve an attachment, are those only of a circuit court commissioner; and he does not in such a proceeding exercise the full judicial authority of the court. *Rowe v. Kellogg*, 206.
2. A proceeding at chambers to dissolve an attachment is a special and peculiar statutory remedy, and though not to be disfavored or construed with unreasonable strictness, it cannot be extended beyond the statute, and therefore can be resorted to only by a defendant whose interests are invaded. It is not available to creditors or to assignees for their benefit. *Id.*
3. Defendants in an attachment proceeding made a general assignment. The assignees moved to dissolve the attachment. A similar motion was made by one of the defendants who had an interest in the property. The dissolution was ordered, and the order was brought up for review on certiorari and sustained as to the defendant. *Held*, that the writ of certiorari was not of right under the circumstances; and that though the assignees had no statutory right to move for dissolution, yet the equities were in their favor and no costs would be allowed for or against them. *Id.*
4. Expenses of taking care of goods under attachment are not, *it seems*, a lien on the property after the goods have been released by a supersedeas bond and the case is ended; and it is doubtful if such expenses are taxable as costs. *Genesee County Savings Bank v. Ottawa Circuit Judge*, 306.
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3. The Supreme Court will not review on certiorari the conclusions reached on competent testimony as to whether an attachment should be dissolved. *Rowe v. Kellogg*, 207.
4. Certiorari to review an allowance against a county may be sued out by the clerk of the board of supervisors, and it is assumed that in doing so he has the authority of the board if it does not repudiate his action. And it is unimportant that he sues it out as county clerk. *Alcona County v. White*, 503.
5. The judgment to be enforced on its affirmance upon certiorari to a justice is that of the justice himself; the statutory provision that when it is affirmed the circuit court shall order it to be executed, does not preclude such delays as may be necessary to take the case to the Supreme Court; nor do such delays divest jurisdiction to enforce it on final affirmance. *People v. Blake*, 239.
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2. Courts are not to make contracts between parties but are to enforce them. *Mich. Coll. of Med. v. Charlesworth*, 523.
3. Contracts cannot arise where there is no mutuality; and certainly not where one person not only had no intention of binding himself, but was not even supposed by the other to be making himself personally liable. *Id.*
4. A tramp was run over by a locomotive in a railway yard. A surgeon being summoned to help him, telephoned the railway superintendent and asked if he should do so. The superintendent answered, yes. Nothing was said about pay, and in fact the superintendent had no authority to bind the railway company to pay for surgical aid. *Held*, that there was no contract upon which he was personally liable for it. *Id.*
5. Parties to a contract are not liable after it has been altered, unless they have consented to the new subject matter in the same sense. *Toledo & South Haven Ry. v Lamphear*, 575.
6. Where the effect of a written contract will depend upon contemporaneous verbal representations made by a third person, he must be an actual agent or his action must be ratified with knowledge of what he has done. *McGraw v. Germania L. Ins. Co.*, 147.
7. The "good-will" of a business establishment rests in the probability that its old customers will continue their custom and commend it to others. *Myers v. Kalamazoo Buggy Co.*, 215.
8. A man had a contract from his brother for certain land, the vendor reserving the right to declare it void if any payment was a month overdue. The vendee was to pay all taxes. The contract was in duplicate. No one held continuous possession of the land. Only one payment was made on the contract, and several years later the vendor, in furnishing a tax-list of his lands, included the property in question as if it were land upon which it was his duty to pay the taxes, distinguishing it from some other land on which others ought to pay. After the death of both parties both copies of the contract were found among the vendor's papers, and his administrators filed a claim against the vendee's estate for the amount unpaid on the contract. *Held*, that on the facts above stated they did not make out a case; the facts indicated that the contract had been rescinded. *Swain v Baldwin*, 119.

between parent and child for transfer of land, 30 (4).
breach of, by neglect of lessee to pay paving assessment, 294 (2).
for conveyance of land to person paying mortgage, 30 (5).
for sale of landed interests; what they do not cover, 540.
justification for non-performance, 552 (2).
modification of terms by usage, 609 (4).
relation between railway passenger and lessee of track, 91 (3).

Contradiction—of deed by bond for transfer, not allowable, 83 (5).

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of witness on impertinent matters, 320 (3).
Contributory negligence—as a question for a jury, 55 (4).
in crossing railway track, 273.
Copy—of plat of governmental subdivision as evidence, 246 (2).
CORPORATIONS.
Individual stockholders cannot be made joint defendants with their corporation in an action upon a labor debt brought by an assignee thereof (How. Stat. § 4886), though they may be in an action brought by the original creditor. How. Stat. § 4110. *Connors v. Carp River Iron Co.*, 168.
agent of, taking appeal; time for appealing, 258.
incorporation of religious societies by user, 571.
taxation of car-loaning company, 641 (2).
COSTS.
1. Costs were denied on granting a new trial where it appeared that much of the litigation had been unnecessary and needlessly expensive, and it was doubtful if substantial injury had been done. *Clark v. Wiles*, 324.
2. A re-taxation of costs to include the expense of taking care of property attached in the case was properly *denied* where the affidavit for taxation did not give the names and identify the services of those whom plaintiff claimed to have paid, nor itemize the expenditures. *Genesee County Savings Bank v. Ottawa Circuit Judge*, 305.
3. An affidavit for the taxation of costs should itemize them with exactness especially if those to be charged with them are not interested alike. *Id.*
expenses in caring for attached goods, 306 (3).
from neglect to object to irregularities, 130 (2).
on certiorari, dissolution of attachment, 206 (5).
on dismissal of bill on doubtful evidence, 116.
on dismissal of bill to set aside deed for fraud, 469.
on overruling demurrer, adjustable on final decree, 112.
on recovery upon one of several counts, 241.
COUNTIES.
1. A county treasurer who, in settling with the county, has charged himself with certain money as received from his predecessor, when it has not in fact been received, is not estopped, in suing his predecessor for the amount, from claiming that the latter had not paid it. *Van Ness v. Hadsell*, 561.
2. A county treasurer's entries on his official books of the balances remaining at the end of his term are evidence against him as admissions of the amount which he has paid over to his successor. *Id.*
3. Assumpsit on the common counts lies at the suit of a county treasurer against his official predecessor, for the amount of county moneys which the plaintiff has accounted for to the county as received from defendant but which in fact has not been so received. *Id.*
4. A county treasurer's books are admissible in evidence in an action involving the amount turned over to his successor, and alterations in the entries cannot be presumed unless they are manifest, nor presumed to be wrongful. *Id.*
5. In an action by a county treasurer against his predecessor for moneys which the latter should have paid over to him, inquiries into plaintiff's private business or his bank account are impertinent unless there is some offer to show that they bear on the issue whether the money has been paid over. *Id.*
6. A county treasurer sued his predecessor for moneys which defendant should have paid over but had not, and defendant sought to dispute an entry on his own books which showed the receipt of money from

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a certain township. *Held* proper for the court to suggest that he should have resorted to the township treasurer to show that it was not paid. *Id.*
certiorari to review allowance against, 503 (1).
road commissioners not county officers, 503 (2).
road district taxes not county moneys, 503 (3).
treasurer must permit inspection of liquor bonds, 132.
County clerk—suing out certiorari for board of supervisors, 503 (1).
Counts—in declaration, to be construed as an entirety, 105 (6).
when election between them is unnecessary, 226 (4).
COURTS.
1. A motion for an order to show cause why a case should not be transferred was denied where the circuit judge, in the exercise of his statutory power, had passed upon certain disputed facts. *Passmore v. Saginaw Circuit Judge*, 237.
2. Objections to the form of a petition for the removal of a cause from a State to a Federal Court are rather for the latter to consider than the former, as the Federal Court should decide for itself with what precision and directness the right to removal must be shown. So *held*, where it was objected that the petition for removal presented only the pleadings, and did not specify the Federal question involved. *Fornerook Mnfg. Co. v. E. T. Barnum Wire & Iron Works*, 552.
3. A patentee sued one who had contracted for the right to manufacture under the patent, and it appeared that questions might arise as to whether the manufacture had been carried on under this patent or another and whether the latter was valid as against the former. Defendant had the case removed to a Federal court. *Held*, on error, that the conflict of patents was the Federal question, if any; and though it was barely presented, the writ of error would be dismissed and the plaintiff left to move in the Federal court. *Id.*
4. The probate courts of Michigan have, in probate matters, a general, and, for the most part, exclusive jurisdiction; and their orders cannot be attacked collaterally upon any assumption that evidence was wanting to support jurisdictional allegations; their action, when properly invoked, is presumed to be rightful. *Morford v. Dieffenbacker*, 593.
administrator not presumed to be always before the court, 265 (3).
appeals of proceedings to recover possession of land, 80.
cannot make contracts, 523 (1).
cannot exercise pardoning power, 16 (5).
cannot go back of proximate cause, 55 (3).
dissolution of attachment at chambers, 206 (1).
equal division of Supreme Court; decision, 350 (1).
equal division of Supreme Court; conclusiveness of judgment, 350 (4).
has control of costs on overruling demurrer, 112.
intimation as to degree of punishment, 15 (6).
judicial notice of public statutes as to turnpikes, 583 (1).
liens not to be created by courts, 325 (2).
order for execution of judgment on affirmance, 239 (3).
probate judge's appointment of special drain commissioner, 608.
review in Supreme Court of dissolution of attachment, 207 (6).
suggestions to counsel during trial, 561 (8).
transaction found to be a sale not to be treated as security, 278 (2).
COVENANT.
A covenant against incumbrances is not a covenant to defend a suit upon an incumbrance. *S. C. Hall Lumber Co. v. Gustin*, 625.
Creditors—statutory dissolution of attachment, 206 (2).
CRIMINAL LAW.
1. It is not compounding a felony for an official to account for moneys

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as received from his predecessor, and himself assume their payment upon the latter's assurance that he will make the amount good if the accounts are incorrect. *Van Ness v Hadsell*, 560.

2. Where an information alleges that the respondent appeared as a witness "on his own behalf," no other statement that he had been allowed to testify "at his own request" (How. Stat. § 7544) is necessary. *People v. Brown*, 15.

3. A circuit judge's return to a writ of certiorari issued to ascertain whether or not a plea of guilty was voluntary is conclusive as to the fact, of which the judge is required to satisfy himself by private examination. *Id.*

4 Where an affidavit for a certiorari to determine whether a plea of guilty was voluntary set forth that the prosecuting attorney had procured it by holding out hopes of leniency, the judge, in making return to the writ, properly attached the prosecuting attorney's affidavit that he had in no way approached the accused. *Id.*

5. A prisoner who lets his plea of guilty stand after a full examination by the judge as to whether it was voluntary, and a frank assurance from him that he must inflict some punishment by way of example, cannot complain that his plea was obtained by raising false hopes of leniency. *Id.*

6. Judgment on a plea of guilty should be set aside if the plea was made in consequence of any intimation from the judge that the sentence would be more severe in case of conviction upon a trial. And it should be set aside, even if the intimation was not by way of threat, but the punishment was severe. It need not be, however, if the judge, in answer to importunities, has only shown a disposition to inflict a milder punishment on confession of guilt, and has done so. But no such intimation, however guarded, is proper. *Id.*

7. A person sentenced by a justice to ten days' imprisonment removed his case by certiorari and afterwards obtained a stay of proceedings in order to take out a writ of error. The conviction was affirmed and the case remanded, after which the period of imprisonment ran four times before the sentence could be carried out. *Held*, that this did not divest the jurisdiction to put it into execution. *People v. Blake*, 239.

affirmance of judgment on certiorari, 239 (3).
evidence of burglary by possession of goods, 334.
perjury not purged by immateriality, 15 (2).
statements imputing commission of crime, 457 (2, 5, 7).
suspension of sentence indefinitely, 16 (5).

Cross-examination—curing allowance of hypothetical question, 609 (3).
latitude allowed, 320 (2), 457 (9).
upon witness' impressions, 457 (7).

Cross-suit—suit and cross-suit constitute one cause, 625 (7).

Cruelty—by language; and making companionship unsafe, 492 (2, 3).

CUSTOM AND USAGE.

1. Usage cannot be shown to modify the essential terms of a contract, whether expressed or implied, nor be shown at all if it conflicts with the settled rules of law, or unless it is known to the parties. It is contracts made in the ordinary course of business without particular stipulations that are presumed to be made in the light of usages. *Van Hoesen v. Cameron*, 609.

2. A custom among horse-dealers that a warranty shall not extend to latent defects cannot be shown to affect a horse trade with a man who was not accustomed to dealing in horses, and to whom an explicit warranty of soundness was given. *Id.*

habit of servant to leave horse unhitched, 73 (1-4, 6).

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DAMAGES.
1. Damages cannot be recovered for purely accidental injuries. *Lewis v. F. & P. M. Ry.*, 55.
2. Acts done by authority of a valid statute, and with reasonable care will not support any liability for resulting damage. *Highway Commissioners v. Ely*, 173.
3. Where the declaration in an action for damages alleges fraud as the basis of the action, the facts must be proved as set forth. *Collins v. Jackson*, 186.
for killing of sheep by dogs, 304.
for negligence of register of deeds, 104 (1).
for seduction, committed without force, 320 (5).
in action for fraudulent representations by vendor, 186 (3, 6).
libelous statements sustaining damages, 457 (1, 5, 8).
not waived by use of vessel after discovering defects, 210 (3).
case submitted only on question of damages, 514 (1).
verdict covering special damages, 324 (3).
Damnum absque injuria—to abutting owner, lawful ditch, 173 (2).
Dams—to obstruct the natural flow of water, 583 (3).
Date—evidence for purpose of establishing, 321 (4).
Debtor and creditor—bank is depositor's debtor, 134 (2).
creditor's action on labor debt; joinder of defendants, 168 (1).
creditors can take out letters of administration, 230 (2).
impeachment of sale made by debtor, 347 (1).
payment of bill on presentation by employee, 649.
statutory dissolution of attachment, 206 (2).
Deceit—trover for goods obtained by deceit, 232 (1).
Declaration—amendment of statement of party, 593 (1).
count in declaration to be construed as an entirety, 105 (6).
in action for vendor's false representations, 186 (3, 6).
joining several causes of action, 226 (3).
statement therein of tort, which is waived, 226 (2).
variance as to consideration in action for fraudulent sale, 186 (2).
Declarations—by grantee; when they may be shown in ejectment, 83 (7).
of authority, by employee, to receive payment, 649.
Dedication—description in deed estops from disputing, 466 (2)
DEED.
1. A bill filed by a daughter against her mother to obtain the benefit of a deed from the latter was dismissed, and on appeal the dismissal was affirmed, but without costs of the Supreme Court against either party, where, though the proofs were strong, they did not sufficiently preponderate for complainant to show that the mother's deed to the daughter had ever been fully delivered so as to place the property beyond the mother's control. *Devaney v. Koyne*, 116.
2. A flighty old man deeded his homestead to his daughter and her husband and they gave him back a life lease of it and were to support him. But they all lived together and quarreled frequently, and finally the son-in-law fell upon him and smote him and drove him out. The old man then went to a lawyer, whom he begged to give him a home, and he promised to deed the land to the lawyer if the latter would get it back. The son-in-law was induced to surrender the land to save himself from prosecution for the assault he had committed, but he proposed to deed it back to the father-in-law. The lawyer, however, said it should be deeded directly to him, so that the old man's wife should not acquire a dower interest in it. The old man and his wife had separated, and the son-in-law claimed to have paid her for joining in the first deed, and he refused to deed to the lawyer unless the latter would make good that payment. An arrangement was finally

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made on that basis, and the lawyer gave his note for the amount and a mortgage on the land to secure it. The old man then went to live with the lawyer, but on the next day left him, and he and his daughter and son-in-law filed a bill to set aside the deed to the lawyer as having been obtained by fraud. *Held*, that as on the evidence the old man was incompetent to do business and everybody knew it, not only that deed, but all the others should be set aside and the note and the mortgage declared void, and the land deeded back by the lawyer to the old man, whom the Court recommend to guardianship. But as no fraud appears on the lawyer's part as against the son-in-law and his wife, the bill should be dismissed as to them with the costs of solicitor's fees in both courts to the defendant, while the old man should also recover the costs of both courts. *Raynett v. Baluss*, 469.

3. A deed is void that runs to a non-existent grantee. *Skinner v. Grace Church*, 543.
4. Negotiations for a sale of land, including a bond for its transfer, are merged in the deed thereof; and while the bond cannot contradict the deed it is proper to resort to it for an explanation of ambiguities therein. *Moran v. Lezotte*, 83.
5. Every word in a deed must, if possible, be given effect and harmonized with all the rest. *Id.*
6. Rules of construction are only for reaching the probable intent of the instrument construed, and are necessarily flexible. *Id.*
7. A description in a deed which gives a part of the boundary as "thence running *to the rear* of the said" land, does not necessarily mean that the granted parcel is bounded by the rear line of the land referred to, but may simply indicate the direction of the boundary, as if the word "towards" were used instead of "to." *Id.*
8. The statement of quantity in the descriptive clause of a deed may properly be taken as controlling where the circumstances show that it is the particular least likely to be wrong, and where the description is ambiguous or indefinite in respect to fixed lines and monuments. *Id.*

estoppel by description in deed, 466 (2).
from religious society of land in payment of salary, 543 (2).
laches in filing bill to set aside deed, 511.
negligence of register of deeds in abstract of title, 104 (1).
not including land for which ejectment is brought, 83 (6).
of land sold under probate license by administrator, 340 (1).
when it does not break adverse possession, 261 (4).

Default—of administrator in payment of claims, 266 (4).
when prerequisite to order to take testimony, 624 (1).

Defects—in foreclosure proceedings, where possession is retained, 261 (4).
in proceedings to incorporate religious society, 571.
in vessel; use by purchaser after finding, 210 (3).

Definitions—"good-will." *Myers v. Kalamazoo Buggy Co.*, 215 (1).

Degree—of punishment; intimations of court, 15 (6).

Delay—in enforcing sentence of imprisonment, 239 (2).
insufficient to divest jurisdiction to enforce judgment, 239 (3).

Delivery—of deed sufficient to transfer control, 116.
sufficiency of delivery on sale of property, 1 (4).
when unnecessary to transfer title, 1 (1–3), 335 (1), 347 (1).

Demand—before bringing replevin for borrowed property, 114.

Demurrer—multifariousness not considered in overruling demurrer, 112.

DEPOSITION.

1. A deposition prematurely taken is properly suppressed; and if not suppressed would be set aside by a rightful claim to have the testimony taken in open court. *S. C. Hall Lumber Co. v. Gustin*, 624.

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2. Depositions, in Michigan, have no validity unless the terms of the statute under which they are taken (How. Stat. § 7461) are substantially followed, or expressly waived; and under the implications of the statute and the uniform practice the name of the witness to be examined must be correctly given in the notice that the deposition will be taken. The examination of James Horan is not authorized by a notice that the deposition of Patrick Horan will be taken; and James Horan's deposition would be inadmissible. *Patterson v. Wabash, St. Louis & Pacific Railway*, 92.
3. The facts making it necessary to take a deposition are not required by statute to be set forth in an affidavit served upon the adverse party; it is enough if they are given in the notice to him that such deposition will be taken. But before a deposition can be put in evidence it must be shown to the court that some one of the statutory reasons exists for taking it; and the affidavit would be prima facie proof thereof, where the practice is to serve it. *Id.*

Deposits—bank is debtor for, 134 (2).
Description—in deed estops from disputing dedication, 466 (2).
in deed; how supplemented when ambiguous, 83 (6).
in deed; statement of quantity, 83 (1, 4).
of land for which ejectment is brought, 246 (4).
of personal property on assessment roll; surplusage, 641 (3).
of vessel entered for sale on ship-broker's books, 210 (2).
Desertion—differs from separation of married persons, 492 (1, 2).
DEVISE AND LEGACY.
1. A devise of property for the devisee's natural life, with authority to dispose of enough for his support, if the use of it should be insufficient, gives only a life estate with conditional power of disposal. And so long as any money bequeathed by the will is available for the devisee's support, the real property cannot be sold for that purpose. *Morford v Dieffenbacker*, 594.
2. A fund provided for the "support" of a person cannot be appropriated to the building or completion of a dwelling place. *Id.*
3. If a mortgage upon the estate of a testator is a bona fide indebtedness which the residuary legatee is bound to pay, it cannot be deducted from the amount of a general legacy. *Wheeler v. Hatheway*, 547.
4. Interest upon specific bequests runs from the testator's death; but in the case of general legacies it does not run until the expiration of a year from that time—or in states where the law or the probate judge allows a year for paying debts and legacies, not until a year has passed since letters testamentary were granted; or, in the case of a residuary legatee, a year from the date of filing his bond. *Id.*
5. General legacies of fixed sums of money are payable whenever the condition of the assets of the estate will admit of it, if no time of payment is fixed. *Palmer v Keam*, 617.

substitution for executor and trustee, by will, 617 (2).
Discontinuance—of replevin suit; election of judgment for value, 238.
of suit on justice's judgment as to parties not served, 647 (4).
Discretion—as to re-opening foreclosure sale, 557 (1).
of highway commissioner in ditching, 173 (1).
to refuse to dismiss appeal for non-payment of fees, 242.
Dismissal—of appeal for want of notice of settlement, 130 (1).
of appeal from a justice for non-payment of fees, 242.
of bill to obtain benefit of deed, 116.
of bill to set aside deeds for fraud, 469.
of divorce bill; review of decree, 492 (4).
of writ of error in case involving Federal question, 552 (3).
of proceedings to recover possession of land, 80.

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Dissolution—of attachment by judge at chambers, 206 (1, 2, 5).
of attachment; review on certiorari, 207 (6).
of attachment; right to move therefor, 206 (3).
Ditches: See DRAINS AND SEWERS.
Division—of profits, not amounting to partnership, 9 (2).
of townships; effect on legal proceedings, 182.
Divorce—appeal from order overruling plea, 115 (1).
causes of; desertion and cruelty, 492 (1-3).
Docket—of justice; certified transcript of judgment, 647 (2).

DRAINS AND SEWERS.

1. Notice is necessary to jurisdiction in proceedings to run a township drain. *Bixby v. Goss*, 551.
2. Proceedings to lay out a township drain, assess compensation and levy the drain tax are absolutely void as against a non-resident owner who is neither named in the proceedings nor notified thereof, and whose husband is treated as the owner. *Id.*
3. A probate judge's ex-parte appointment of a special commissioner in proceedings to construct a drain is void where no notice of the petition for such an appointment was given to those who would be taxed for the drain. *Bettis v. Probate Judge*, 608.
4. The injury, if any, which a lawfully constructed ditch occasions an abutting owner, is damnum absque injuria. *Highway Commissioners v. Ely*, 173.
5. The cost of drain proceedings can be recovered by the drain commissioner in assumpsit against the petitioners for the drain, if special commissioners shall find that there was no sufficient ground for the petition. How. Stat. § 1697. *Held*, that where the petition was approved by the special commissioners, but the drain commissioner had surveyed a ditch differing materially from that asked for, there was no ground for the action. *Drain Commissioner v. Palmer*, 270.
6. It is "willfully" obstructing a public ditch for one who knows its character to purposely and perversely fill it up in a permanent way, even though his object is to obtain access from his lands to the highway, and the act is done under a mistaken notion of his rights. *Highway Commissioners v. Ely*, 173.

certiorari to review township drain proceedings, 551 (3).
conclusiveness of decree sustaining drain proceedings, 323 (1).
highway commissioner's power to ditch, 173 (1, 4).
trespass committed in running drain, 324 (4).
Drunkenness—of guest at hotel as relieving innkeeper's liability, 199 (1).
Due process of law—deprivation of property by taxation, 478 (5).

DURESS.

There is no duress, as matter of law, when one who, with full knowledge of all facts releases his claim of equities to those who refuse to recognize it and insist upon an adverse claim, does so in order to induce them to surrender property, the right to which is disputed and which they have detained under a claim of ownership. *S. C. Hall Lumber Co. v Gustin*, 624.

Earnest money—when needed for transfer of title, 335 (1).

EJECTMENT.

1. Ejectment for land described as being in the southeast quarter of a specified section cannot be maintained if the evidence shows that it lies west of a line drawn north and south through a quarter-post that stands midway of the south section line. *Wilson v. Hoffman*, 246.
2. Disregard of the evidences furnished by fences, buildings and common repute, as to the true location of a surveyed line would justify granting a new trial in ejectment. *Baker v. McArthur*, 140.

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3. In ejectment for land which defendant claims was not included in the deed under which plaintiff's title is asserted, the plaintiff, if the deed is ambiguous, can show such conjoint acts of the parties thereto as tend to show their understanding of the location of the boundary and that stakes placed by them were so placed to define it. *Moran v. Lezotte*, 83.
4. Declarations by an original grantee before parting with his title may be shown in an action of ejectment brought by parties claiming under him, if adverse to the claims made by them. *Id.*
5. Plaintiff in ejectment is entitled to a judgment for so much of the land as he shows title to, even though a larger quantity is in dispute. *Id.*

bill to enjoin ejectment proceedings, 518 (1, 3).
dispute as to boundary of surveyed lots, 139 (1, 2).
estoppel by judgment in case involving same interests, 261 (2).
evidence of title to sustain bill to enjoin ejectment, 518 (3).
Election—between counts; when unnecessary, 226 (4).
by taking appeal, to abide by plea, 115 (2).
to take judgment for value in replevin, 238.
Entries—in register's books as evidence, 105 (2, 3).
of judgment on verdict in justice's court, 302 (2).
on official books in evidence of payments, 561 (4, 6, 8).
under warranty deed as ouster of co-tenant in common, 329 (2).
EQUITY.

1. In a suit for an accounting defendant has the burden of proving what allowances should be made to him. *Thatcher v. Hayes*, 184.
2. A defaulting officer quitclaimed to one of the sureties on his official bond the entire title to lands in which another person had a joint interest with himself, the grantee assuring him that his conveyance carried his own title only and that the interests of other persons could be arranged afterwards. *Held*, that the owner of the joint interest could compel the grantee, by bill in equity, to convey to him his interest; and that the grantee could not plead the Statute of Frauds. *Byrne v. Rood*, 67.
3. The doctrines of subrogation and of equitable lien are to prevent fraud and do justice, and should never be applied where subrogation would work injustice, or the establishment of an equitable lien would not be carrying out the intent of the parties. *Kelly v. Kelly*, 30.
4. Complainant must abide by the case made by his bill. Neither unproved allegations, nor proof of matters not alleged, can be made a basis for equitable relief. *Id.*
5. Where a plea is overruled with leave to answer within a limited time, *it seems* that taking an appeal before the expiration of that period may be treated as an election to stand by the plea, and the appeal may be sustained accordingly. *Cross v. Cross*, 115.
6. A complaint for multifariousness was not considered in affirming an order overruling a general demurrer to a bill which in fact stated a case for equitable relief; the costs in the case were within the control of the trial court and could be adjusted on final decree. *Storrs v. Wallace*, 112.
7. An order to take testimony before a commissioner cannot be entered until the expiration of the time allowed for claiming examination in open court (Ch. Rule 47); and this cannot be claimed until the cause is at issue as to all defendants or until those who have not answered are defaulted. *S. C. Hall Lumber Co. v. Gustin*, 624.
8. A decree in chancery will not be disturbed for errors in the admission of evidence if there was enough, aside from the testimony complained of, to support the findings on which the decree is based. *Michie v. Ellair*, 518.

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affidavit of publication, 236.
ERROR.
1. A ruling is presumed to have been supported by evidence if all the evidence does not appear in the record. *McGraw v Germania Fire Insurance Co.*, 146.
2. Sufficient evidence to warrant the judgment is presumed to have been produced where the bill of exceptions does not purport to contain all that was given. *Baynes v. Mich. Air Line Ry.*, 243.
3. A case removed to a court of record for review becomes subject to its rules of practice; and the party removing it cannot take advantage of delays necessarily incident to the operation of those rules to contest, on that ground, the jurisdiction to proceed. *People v. Blake*, 239.
allowance of question to which answer was immaterial, 320 (1).
based on compromise on verdict, 302 (3).
certiorari not the same as error, 302 (1).
dismissal of writ in case involving Federal question, 552 (3).
in criminal case; delay by stay of proceedings, 239 (2).
joinder of partners in suing out writ, 652 (3).
to require jury to specify acts of negligence, 224 (3).
ESTOPPEL.
Ejectment was brought against the executors of an estate, and they prevailed. The executor of one of the heirs, to whom the rest had conveyed their interests, afterwards brought ejectment for the same land against a grantee of the plaintiff in the first action. *Held*, that the former judgment operated as an estoppel against such grantee. And if all the heirs united in defending the first suit the estoppel would not be affected by a question whether, as between one of the heirs and the ancestor, the title was in one or the other. *Whitford v. Crooks*, 261.
by receipt from denying payment, 561 (3).
from claiming for cestuis que trustent, 532 (4).
from justifying non-performance of contract, 552 (2).
from objecting to validity of proceedings, 323 (2).
from relying on stipulation after seeking to defeat it, 635.
from suing a church society for salary as minister, 543 (2).
of tenant-in-common from demanding partition, 294 (4).
on firm, by consent of partner, 532 (3).
Estrays—injuries for want of fencing along railway track, 13 (1, 4).
EVIDENCE.
1. Courts will take notice of the recital in public statutes of the time when a turnpike was laid out and built by the general government, and of the fact that it afterwards became subject to State authority and went into the charge of the ordinary town officers. *Boyd v. Conklin*, 583.
2. A certificate by the commissioner of the State Land Office that "the annexed is a true and correct copy of" a specified governmental subdivision "as shown on government plat on file in this office," is insufficient to authorize the admission in evidence of a map of the subdivision referred to. *Wilson v. Hoffman*, 246.
3. An expert's qualifications depend on his experience and not upon his profession: a man may know something of horses without being a horse doctor. *Peer v. Ryan*, 224.
4. A lawyer sued his client for the balance of his bill, and put in testimony as to the value of his services. Defendant produced a bill rendered. *Held* proper to charge the jury that defendant had given no evidence of value, and that if they were satisfied with the testimony given they might base their verdict on it. *Gartner v. Beller*, 333.

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as to delivery of deed; preponderance, 116.
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Exception—to refusal to give requests to charge, 13 (3).
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EXECUTION.
Mere intention to take an appeal does not preclude the prevailing party from taking out an execution. *Castor v. Allegan Circuit Judge*, 318.
of sentence of imprisonment; effect of delay, 239 (2).
sale, amounting to conversion, 122 (2).
sale of land on execution whereof validity is disputed, 80.
EXECUTORS AND ADMINISTRATORS.
1. A creditor of a decedent can take out letters of administration upon his estate if others do not do so. *Aldrich v. Annin*, 230.
2. The clause in a will which empowers the executors "to sell and convey any real estate" will be a sufficient warrant for a sale made by one of two executors if the other has renounced the trust, the "authorized" executors having the same authority as all to perform every act allowed by the will. How. Stat. § 5844. *Vernor v. Coville*, 281.
3. An administrator is not to be treated as at all times before the court and bound at his peril to know of proceedings affecting him. *Hilton v. Briggs*, 265.
4. The language in a will which gives an executor his authority is presumed to have been made with reference to the statutory provisions relating thereto, and must be construed as if it embraced those provisions. *Vernor v. Coville*, 281.
5. Possession of real estate could, under the law of 1846 (Rev. Stat. 288, § 7), be held by an executrix, and was in the right of heirs and devisees;

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and the executrix could resist possessory suits therefor, without joining the heirs as defendants. *Barlage v. Detroit, Grand Haven & Milwaukee Railway*, 564.

6. An award paid to an executrix upon the condemnation of land belonging to the estate, would be sustained, under the law of 1846, as paid not only for her personal interest, but for those which she represented as executrix. *Id.*
7. The appearance of the executrix alone as respondent in condemnation proceedings against the estate, was *held* to give jurisdiction where the estate was in solido and was still in administration; the rights of heirs and devisees would be secured by her personal liability and that of her sureties. *Id.*
8. An administrator is not conclusively bound by the inventory he files of the decedent's estate, but may explain and correct it; he may show, *e. g.* that property inventoried did not belong to decedent, but to a firm in which he was a member. *Hilton v. Briggs*, 265.
9. Where a widow as executrix receives money belonging to the estate it is presumed that she accounts for it, and if she does, the heirs, in receiving it, waive all errors. And it is the same in legal effect if the heirs do not receive the money specifically awarded to them but on final settlement are paid their shares. After a great lapse of time, *e. g.* 30 years, it is presumed that full settlement was made. *Barlage v. Detroit, Grand Haven & Milwaukee Railway*, 564.
10. A purchaser at an administrator's sale has all the title the intestate had if the transfer was duly made by deed under a probate license to sell. How. Stat. § 6078. *Curtis v. Campbell*, 340.
11. Claims against the estate of a deceased person can only be enforced by statutory proceedings in the probate court; and in such proceedings all concerned are bound by the proper publication of notice. *Aldrich v. Annin*, 230.
12. An administrator brought suit for an accounting, against one who had made sales for his decedent. A note had been taken on one of the sales upon which a payment of $528 was indorsed. It was found, but only by the aid of a letter written by decedent, that this was really for merchandise turned over to a creditor of his; but as the letter mentioned a smaller sum it was *held*, that it could not be given effect beyond its terms, and that only the smaller sum could be charged against the estate. *Thatcher v. Hayes*, 184.
13. An order that an administrator shall pay the claims against the estate in a given time will not bind him if made as of course on a showing merely that all claims are in and that they amount to less than the estate as appraised; it will at most oblige him in a later proceeding to show cause for not doing so. And on his default an order permitting his bond to be prosecuted determines only the right to sue on it; it does not fix the administrator's liability. *Hilton v. Briggs*, 266.
14. One whose claim against an estate has been allowed but has not been paid within the time limited, makes a prima facie case in an action on the administrator's bond if he shows an inventory of assets exceeding the debts and an order for the payment of the debts; but defendants may rebut this by showing a deficiency of assets. *Id.*
15. Administration is closed on the approval and filing of an executor's bond as residuary legatee. *Wheeler v. Hatheway*, 547.
16. The residuary legatee, in a proceeding against him by a general legatee upon his bond, has a right to examine the plaintiff fully as to what the latter has received from the testator's estate. *Id.*

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Final order—overruling plea of no marriage, 115 (1).
Findings—sufficiency of evidence to support decree, 518 (2).
FIXTURES.
1. Ordinary movable office furniture and ordinary vehicles are not fixtures, and the question whether personal property in use about a mine can be so regarded, is a question of the intent with which it was attached to the freehold. *Scudder v. Anderson*, 122.
2. Personal property that can be removed from the land cannot be part of the realty, when the owner does not also own the land. *Id.*
3. As between landlord and tenant of a mining lease, engines and boilers erected by the tenant on brick and stone foundations, and bolted down solidly to the ground, and walled in with brick arches; and dwellings erected by the tenants for miners to live in, standing on posts or dry stone walls piled together—where such machinery and buildings were intended to be merely accessory to the mining operations under the lease, aud when there was no intention in affixing them to the realty to make them accessory to the soil, and where they can be removed without material disturbance to the land, are regarded as "trade fixtures," and may be removed at or before the termination of the lease. *Conrad v. Saginaw Mining Co.*, 249.
Flowage—from one owner's land to the injury of another's, 583 (2).
obstructions to natural flow of water, 583 (3).
Foreclosure—defence to, for want of consideration for settlement, 210 (1).
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Forum—of cause of action against new township, 182.
FRAUD AND FRAUDULENT CONVEYANCES.
1. Fraud is never to be presumed but must be found. *Edwards v. Edwards*, 347.
2. A vendor's honestly expressed but incorrect opinion as to the amount, quality and value of the goods he sells will not support an action for fraudulent representations, if the purchaser sees or knows the property, or has opportunities to know it. The purchaser cannot recover unless the vendor, with superior means of knowledge, intentionally gives a false opinion as to material facts, for the purpose of defrauding the purchaser, and the latter has reason to rely and does rely on it as true. *Collins v. Jackson*, 186.

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3. In an action brought by a purchaser for fraudulent representations by the vendor, proof that the consideration for the sale was paid for the goods and the good-will of the business, is fatally variant from a declaration which only states that it was for the goods. *Id.*
4. One who bought the goods and good-will of a business, afterwards sued the vendor for fraudulent representations. *Held* necessary to the ascertainment of damages that he aver in his declaration, and show in his proofs, what part of the consideration was paid for the good-will. *Id.*
5. In an action for fraudulent representations by the vendor on the sale of goods, it is for the jury to determine whether the opinion expressed is false and known to be so to the vendor, and to what extent it is relied on by the purchaser without negligence. *Id.*
6. In an action for damages resulting to the purchaser of a stock of goods from the fraudulent representations of the vendor, evidence that the purchaser in settling his affairs had been compelled to dispose of his wife's house and lot, is inadmissible, if not counted on in the declaration, and if the fraud complained of was not the proximate cause of the loss of the house and lot. *Id.*
7. A sale for the nominal purpose of raising money but for a grossly inadequate sum and to a person who has no means, is apparently fraudulent. *Morford v. Dieffenbacker*, 594.
8. A complaint of fraud is of no significance if made by a stranger to the suit in which it is involved and if he acquiesces in it without any attempt to set aside the fraudulent arrangement. *S. C. Hall Lumber Co. v. Gustin*, 625.

action to recover money obtained by fraud, 226 (4).
fraud in contract based on patent right, 552 (2).
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trover for goods obtained by fraud, 232 (1).
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FRAUDS, STATUTE OF.

1. A verbal promise to a merchant to guarantee payment for anything a third person should want in equipping a saw mill, at which he was to manufacture shingles for the promisor, is within the Statute of Frauds, and cannot support an action by the merchant against the person making the promise *Studley v. Barth*, 6.
2. A verbal agreement between a son and his father that if the son will pay the father's debts, and obtain the discharge of mortgages upon his property, the father shall convey to him his real estate, is void under the Statute of Frauds, and can support no rights, either legal or equitable. If the son pays money under such a contract he can, perhaps, recover it back in assumpsit; but the payment will not create an equitable lien upon the real estate in his favor, unless rights inherent in the transaction have sprung up to support it. *Kelly v. Kelly*, 30.
3. The Statute of Frauds in requiring contracts for the sale of lands or landed interests to be in writing, contemplates transactions between principals; it does not cover a bargain between a principal and his agent, whereby the latter is to be paid, for his services in obtaining lands, a certain proportion of the profits on their subsequent sale. *Carr v. Leavitt*, 540.

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GUARDIAN AND WARD.
Guardianship cannot be revived after the release of the ward merely to enable a claim that had been previously filed to be prosecuted against the ward's estate, or to be secured by the guardian's bond. And the claimant has no such interest in the estate as will entitle him to appeal from the order discharging the guardian. *Lyster's Appeal*, 325.
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Heirs—settlement with executrix for money received, 564 (4).
Highway—commissioner's liability to abutting owners, 173 (1).
Homestead—wife's land used as homestead by family, 206 (3, 4).
HOMICIDE.
Evidence that one accused of murder was in the neighborhood where it took place at the time it was committed and was in such a situation that he might have committed it, is not sufficient to show that he did it if no stronger motive is alleged than that he wished to hide an unlawful intimacy indulged before his marriage and to escape liability on a four hundred dollar note. *Peoples v. Detroit Post & Tribune Co.*, 457.
libelous accusations of, 457 (1, 2, 7).
Horse—damage to, by negligence, 224 (3).
injury caused by leaving horse unhitched, 73 (1-4, 6).
qualifications of expert as to horses, 224 (1).
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warranty not affected by usages, 610 (5).
HUSBAND AND WIFE.
1. Land owned by a wife but occupied not only by herself but by her husband and family as a homestead is in the husband's tenancy, so long as it is so occupied, as distinctly as if leased to him. *Rowe v. Kellogg*, 206.
2. In an action by a married woman for personal injuries it is proper to include the expense of medical attendance *Schultz v. Holliday*, 73.
3. A husband, in joint possession with his wife, of land belonging to her, but used as the family homestead, has, as head of the family, such an interest in the land as entitles him to complain of any unlaw-

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ful interference with it; and if he is defendant in a proceeding in which an attachment has been levied on such land as his own, his interest therein is sufficient to entitle him to move for a dissolution of the attachment. *Rowe v. Kellogg*, 206.
4. Separation of married persons differs from desertion of one by the other; desertion, in Michigan, is willful abandonment for two years without cause and against the wish of the person abandoned, and it may even be charged upon the one who stays at home. *Warner v. Warner*, 492.
5. A wife who leaves her husband for cruelty which she reasonably believes makes further residence with him unsafe, is not chargeable with desertion; but *he* is. *Id.*
6. It is extreme cruelty for a husband to call a sensitive and refined wife a bitch. *Id.*
7. The Supreme Court will not disturb a decree dismissing a divorce bill unless fully convinced that if it had been in the place of the trial court it must have come to a different conclusion. *Id.*
delivery of goods sold on premises of purchaser's wife, 347 (1).
evidence that insolvent had to dispose of wife's property, 186 (6).
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Hypothetical question—in action upon warranty of property sold, 609 (3).

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of property sold needed to give title, 1 (3).
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Imprisonment—delay in enforcement of sentence, 239 (2).
Inadequacy—of price, ground for re-opening foreclosure sale, 557 (2, 3).
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Incumbrances—construction of covenant against, 625 (8).
Infant—action for seduction; allowance of improper question, 320 (1).
Information—allegation as to respondent; giving testimony, 15 (1).
Infringement—of patent as justification for breach of contract, 552 (2).
INJUNCTION
1. Record evidence of title is not absolutely necessary in a court of chancery, to sustain a bill to enjoin a proceeding in ejectment. *Michie v. Ellair*, 518.
2. A man agreed with his son that the son should have a certain piece of property by way of advancement from his estate, and the son took possession of it accordingly. The father executed a deed with the avowed purpose of delivering it to the son, but it was lost. The father however referred to the advancement in his will and so recognized it. Ejectment was brought for this land by one who, without consideration, had obtained from another of the testator's children a deed of whatever interest the latter had in the land. *Held*, that the son who had occupied and improved it could maintain a bill to enjoin the action, and to clear and confirm his title. His possession and continued occupancy were sufficient notice of his claim, and his case was barred neither by the statute of limitations nor by laches. *Id.*
3. Injunction lies to restrain partners who have sold out their interest in the good-will of a business from carrying on a rival establishment under a name so similar to that of the first as to mislead and draw off business; and the writ lies against all concerned in the new establishment. But it is hardly necessary to interfere with the delivery of

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mail to the latter beyond requiring them to turn over at once to the original establishment so much as may have been intended for it. *Myers v. Kalamazoo Buggy Co.*, 215.
Injury—does not sustain damages if accidental, 55 (2).
to abutting owner from lawful ditch, 173 (2).
to one person gives no right of action to another, 625 (6).
INNKEEPERS.
1. An innkeeper's liability for a guest's baggage is not diminished, but rather increased, by the fact that the guest has got too drunk at his bar to take care of it himself. *Rubenstein v. Cruikshanks*, 199.
2. A guest's obligation to notify the innkeeper if he has property of extraordinary value in his baggage does not attach to a peddler stopping at an inn with his pack, or with the usual appurtenances of his business. So *held* in the case of a peddler who put up at an inn with a comrade, each having a valise and a small box, their baggage amounting to upwards of $300, and whose goods and valise were stolen while in the landlord's care. *Id.*
Inspection—of goods as prerequisite to transfer of title, 1 (2).
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INSURANCE.
1. A person applied for insurance to certain agents. The latter could not place the whole amount in companies which they themselves represented, and went therefore to another agent from whom they obtained the rest, making certain verbal representations to him as to the condition of the property to be insured. The assured had nothing to do with these negotiations. *Held*, in an action on a policy thus obtained at second hand, that the persons obtaining it were agents of the insurer rather than of the assured, and that their verbal representations, if false, could not avoid the policy. *McGraw v. Germania Fire Insurance Co.*, 146.
2. The actual tender of unearned premium is unnecessary to the cancellation of an insurance policy if the minds of the parties have met on the point that the policy is to be cancelled; and if the insured directs the insurance agent to procure other insurance for him, it is presumable that he means him to use for the purpose the money that he would have to return, and the direction would be a waiver of such tender. *Hillock v. Traders' Insurance Co.*, 531.
3. Transactions with reference to the cancellation of an insurance policy are to be construed reasonably and fairly, and in accordance with the evident understanding of the parties at the time. *Id.*
4. A stipulation in a fire insurance policy that the assured, in case of loss shall, *if required*, submit to a private examination, is, if valid at all, so clearly opposed to the general policy of the law that no intendments will be made in pursuance of it; and where the assured person or his agent was notified that the company *desired* such an examination the letter containing such notification was properly excluded from evidence, as it was not in strict accordance with the stipulation. *McGraw v. Germania Fire Insurance Co.*, 146.
5. Where proofs of loss were made by an agent of the assured the latter, in a suit upon the policy, in which the proofs were introduced without objection was properly allowed to testify that he had given the agent authority to act in all respects as he himself would, with reference to the proofs. *Id.*
6. Where a fire insurance policy requires proofs of loss to be made out and sworn to by the assured before he can realize upon the policy, such proofs are a condition precedent; and *it seems* that the assured must make them out himself or show good reason for not doing so and for leaving them to be made out by an agent. And in a suit

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upon the policy the plaintiff has the burden of proof that the case is within the exceptions to the rule which requires the proofs to be made out by the person assured. *Id.*
7. Testimony as to what was done with reference to cancelling a fire insurance policy was properly excluded in an action on the policy where the premium was not returned until the loss actually occurred. *Id.*
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tax on township therefor not township moneys, 477 (1).
Intimations—of court as to degree of punishment, 15 (6).
INTOXICATING LIQUORS.
Mandamus to compel a village board to approve a liquor dealer's bond will be denied if there is nothing to show that the refusal to approve it was capricious, or to rebut the presumption that the board has fairly passed upon all the questions which determine the sufficiency of the bond and the reliability of the sureties. *Parker v. Portland*, 308.
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JOINT TENANTS AND TENANTS-IN-COMMON.
A tenant-in-common may enter into such agreement as to estop himself from enforcing his right to a partition of the premises. *Eberts v. Fisher*, 294.
claim of adverse possession in ejectment, 329 (2, 3).
JUDGMENT.
1. A justice's judgment, though joint in form is not in law a joint obligation binding both defendants alike if only one was served, and it does not merge the debt so as to preclude suing both over again. The one who was not served is not personally bound, and cannot be until he is sued on the original obligation. The judgment therefore may be sued as an individual obligation against the one who was served

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and the case may be discontinued as to the other. *Holcomb v. Tift*, 647.
2. The judgment to be rendered in justice's court on a joint debt when only one defendant is served is prescribed by statute, and the use of the word "defendant" instead of "defendants" in rendering judgment is a mere clerical misprision and leaves the judgment, if not taken up for review, valid as against the defendant who was served. *Id.*
3. Pleas of abatement to the jurisdiction were filed by several defendants, one of whom was a railway company. Both were tried, but in giving judgment the court, while reciting only that the railway company had pleaded in abatement ordered that the declaration of "said plaintiffs be quashed, *and that the said defendants* go thereof without day; and that said defendants do recover of and from the plaintiffs *its costs and charges by it in its* defense in this behalf expended. *Held*, that the word "defendants" in this judgment referred only to the railway company. *Barnes v. Michigan Air Line Ry.*, 243.
4. It is presumed that a particular justice of the peace is the one who certified a transcript if his name is signed, as justice, to the certificate. *Holcomb v. Tift*, 647.
5. A transcript of a justice's judgment is admissible as evidence though certified by another justice, if his certificate shows that he had possession of the docket of the justice who rendered the judgment. *Id.*
6. Personal judgments cannot rest on fictions of law nor be pronounced without an opportunity for hearing. *Hilton v. Briggs*, 265.
7. A decree in equity sustaining the validity of drain proceedings is conclusive upon that point in an action at law involving the same question. *Clark v. Wiles*, 323.
8. Whether the statutory affirmance of a judgment on the equal division of the Supreme Court fixes the rule of law for any case but that which is under review—Q. *State Tax Law Cases*, 350.

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verdict stands on damages unless justification is shown, 514 (1).
JUSTICES OF THE PEACE.
'A jury's verdict in justice's court is conclusive; the justice cannot set it aside nor make it invalid by neglecting to enter judgment on it at once; the law supplies the judgment if not entered, and its subsequent entry in accordance with the verdict is proper. *Alt v. Lalone*, 302.
affirmance of judgment on certiorari, 239 (3).
certiorari to justice not a writ of error, 302 (1).
election of judgment for value in replevin, 238.
judgment in justice's court on joint debt, 647 (1, 4).
payment of fees on taking appeal, 242.
transcript of judgment certified by justice, 647 (1, 4).
Justification—for non-performance of contract, 552 (2).
in action for libel, 457 (1, 2, 7).
needed to disturb verdict on question of damages, 514 (1).
of obstruction to highway, 496 (2).

Labor-debt—liability of stockholders with corporation, 168 (1).
LACHES.
Eleven years unexcused delay in filing a bill to set aside a deed or mortgage is such laches, even among near kinsmen, as will defeat the bill if meanwhile important evidence has been lost by it. *Haff v. Haff*, 511.
by master in enforcing mortgage against servant, 70 (2).
in bar of claim of occupancy, 518 (1).
not imputable where delay is caused by rules of practice, 239 (1).
Land Commissioner—certificate to copies of plats, 246 (2).
Land-contract—claim against estate thereon; rescission, 119 (1).
LANDLORD AND TENANT.
1. A lessee of land agreed to put up a building thereon, the value of which was to be appraised at the expiration of the lease, when the lessor, after proper notice, could have the building on paying its value, or the lease should be extended. *Held*, that an appraisal of the building was unnecessary where no notice was given of a purpose to terminate the lease. And an appraisal of the land by mutual consent was equivalent to an agreement that the lease should be continued, and should not be interfered with by partition where the parties to the lease were tenants-in-common. *Eberts v. Fisher*, 294.
2. A lease provided that the lessee should keep the property insured and should assign the insurance policy to the lessor. *Held*, that in equity no formal written assignment was needed, and if there was none the stipulated insurance would be deemed to be held in trust. *Id.*
3. A lessee's omission to pay a paving assessment could not properly be treated as a breach of his contract, if it arose from a question as to the validity of the assessment, and if he paid it when its validity was settled. *Id.*
4. The jurisdiction of the circuit court on the appeal from a circuit court commissioner of a summary proceeding to recover possession of land,

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is no greater than the commissioner had; and if the title to the land was involved, as it would be if defendant denied the validity of an execution sale under which plaintiff claimed, a motion to dismiss the proceeding should be granted. *Mulder v. Corlett*, 80.
land owned by wife but occupied by family, 206 (4).
trade fixtures removable before termination of lease, 249.
use and occupation of premises leased as right of way, 77 (1, 2).
LARCENY.
Value of stolen property is fixed by rates prevailing at the time and place where the theft was committed, and not in some neighboring city. *People v. Cole*, 238.
Lease—extension of lease, 294 (1, 3).
injury to railway passenger traveling over leased track, 91 (3).
of right of way; action for use and occupation thereof, 77 (1, 2).
trade fixtures removable before termination of lease, 249.
Legacy: See DEVISE AND LEGACY.
Letters—of administration, can be taken out by a creditor, 230 (2).
Levy—certificate of tax levy must be issued by clerk, 182.
of township drain tax against non-resident, 551 (2).
Liability—of stockholders with corporation for labor debt, 168 (1).
LIBEL AND SLANDER.
1. A newspaper article, after stating that P. had murdered a certain girl, said she was known as P.'s woman, and that he had told an alleged confederate that he need have no fears about her murder and had hired him to steal a sack, which he received [to put the body in]; that he had furnished a wagon in which to take her body to the river; that he had intimated to his wife that the girl had been murdered to get rid of her, and that he had confessed adultery to his wife, for which the wife had left him. *Held*, that these were all libelous charges, for which P. was entitled to damages unless it was proved that he had murdered the girl. *Peoples v. Detroit Post & Tribune Co.*, 457.
2. Newspapers may discuss what relates to the life, habits, comfort, happiness and welfare of the people, and in doing so may state facts, draw inferences therefrom and express views upon the facts. Their deductions, even if false, are not actionable unless they cause special damages, but damage is presumed if they impute the commission of crime. *Id.*
3. A newspaper statement imputing the commission of crime, but based on facts that have no legal tendency to prove it, is not privileged. *Id.*
4. In an action for newspaper libel questions to the editor as to the purpose of the publication and the publisher's feelings toward the libelled person, and as to what the editor, before publishing the libel, had thought of its veracity, were admissible as bearing on the questions of damages and the malice or good faith of defendant. *Id.*
5. Two newspapers accused a man of murder and he sued them separately for libel. The affidavit of a convict that he was present when the murder was committed, was procured for one of the cases, but it conclusively appeared that he was elsewhere at the time sworn to, and the affidavit was not used. *Held*, that though it might perhaps be admissible in the other case to show defendant's good faith, it could not be used as proof of the murder. *Id.*
6. In an action for libel based on a newspaper article imputing the murder of a girl, defendant sought to justify by proving it. *Held*, that the plaintiff, on producing evidence that tended to show that the girl was the victim of an abortion procured by some one else, was entitled to have the case submitted on that theory, and it was error

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to exclude a question put to a competent witness as to whether the facts shown were inconsistent with death by abortion. *Held* proper also to cross-examine one who had testified as to the victim's relations with the plaintiff, upon the impressions witness had received therefrom as to her feelings toward this person thus charged with the murder. *Id.*

7. In an action for newspaper libel the editor was properly allowed to testify that at the request of plaintiff's counsel he had previously published a synopsis of the declaration in a similar suit brought by the same plaintiff against another paper. *Id.*
8. Special questions may properly be submitted to the jury in a libel suit, if the case is a proper one for the jury, to determine whether defendant acted in good faith and with due care. *Id.*

License—to administrator to sell land, 340 (1).

LIEN.

1. An equitable lien upon real estate requires (1) a written contract identifying the property as security for the debt; or (2) such relations between the parties as will make it right and just to declare the lien,—as, for example, in the case of a joint owner or bona fide purchaser making improvements in good faith, or in the case of partners' liens. *Kelly v. Kelly*, 30.
2. Courts cannot create liens, but can only declare and enforce them. *Lyster's Appeal*, 325.

on attached property for expenses, 306 (3).
doctrine of equitable lien, 30 (2).
not raised by payment on verbal land sale, 30 (4).
subrogation thereto, on discharge thereof, 30 (5, 6).

Life-estate—given by devise, with conditional power of disposal, 594 (4).

LIMITATION OF ACTIONS.

1. The fact that a note is outlawed does not prevent the foreclosure of the mortgage which secures it. *Webber v. Ryan*, 70.
2. Adverse possession cannot arise until there is some one to dispute the right claimed. *Marble v. Price*, 466.
3. Adverse possession requires exclusive occupancy known to and against the will and consent of those who are interested and have a right to contest the possession. *Id.*
4. An owner of outlots which he does not fence or cultivate may establish an adverse possession by cutting grass and timber, ditching, paying general and special taxes, and openly and notoriously claiming and using the land. *Curtis v. Campbell*, 340.
5. Adverse possession is not broken by deeding the land away if the grantor continues in possession and takes back a mortgage for purchase money which he afterwards forecloses and under which he himself becomes foreclosure purchaser. And it is immaterial that the foreclosure proceedings are defective, if the possession is retained. *Whitford v. Crooks*, 261.

adverse possession as between tenants-in-common, 329 (2, 3).
statute of limitations in bar of claim of title, 518 (1).

LIS PENDENS.

A suit and cross-suit constitute one cause, and notice of the suit is notice of the cross-suit also. So *held* in the case of a lis pendens filed in an original foreclosure suit, but not in a cross-suit for foreclosure; it was constructive notice to all the defendants. *S. C. Hall Lumber Co. v. Gustin*, 625.

Loss—of evidence by delay in proceeding, 511.

Machinery—as trade fixtures about a mine, 122 (3). 249.
Malice—in libelous statements; evidence, 457 (2, 8, 11).

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Malicious prosecution—joined with assault and false imprisonment, 241.
MANDAMUS.
1. Mandamus does not lie to vacate an order that was not erroneous when made, whatever has taken place since. *Castor v. Allegan Circuit Judge*, 318.
2. Mandamus lies to compel a county treasurer to permit the inspection of liquor bonds filed in his office. *Brown v. County Treasurer*, 132.
3. Mandamus lies to compel a town clerk to issue the proper certificate for the levy of a tax to satisfy a judgment against the township, even though the cause of action arose in territory that was set off as a new township after it arose and before judgment. *Courtright v. Town Clerk*, 182.
to compel village board to approve liquor bond, 308.
to set aside allowance of costs, 241.
Map—admissibility of map certified to by Land Commissioner, 246 (2).
of government survey, as evidence, 246 (1).
MASTER AND SERVANT.
1. In an action for damages caused by the recklessness of defendant's servant in leaving his horse unhitched, it is proper for the identification of the turn-out to show that the name of defendant's firm appeared on the vehicle. *Schulte v. Holliday*, 73.
2. A servant's long-continued and notorious habit of leaving his master's horse unhitched may be shown in an action against the master for damage caused thereby. *Id.*
3. Where a person sued for damages caused by the recklessness of a driver in his service defends on the ground that the team belonged to a third person and that the driver was in his employment, it is proper to show that defendant and the third person had been in partnership until shortly before the injury. *Id.*
4. The question whether a servant is acting within the scope of his employment depends upon facts as to which the finding of a jury is conclusive. *Id.*
5. In an action for injury caused by the conduct of a servant the burden of proof is not on the plaintiff, after he has shown that at the time the injury was done the servant was in the employment of defendant in his regular business, to show farther that he was acting in the course of his employment. *Id.*
accounting between master and servant as to mortgage, 70 (2).
admissions of brakeman not in line of duty, 92 (6).
presentation of bill by merchant's employee, 649.
MAXIMS.
1. The maxim, "Sic utere tuo alienum non lædas," applies to a railway company that has a right of passage over the track of another, and binds it so to use its right as not by negligence to injure others having like rights. *Patterson v. Wab., St. L. & Pac. Ry*, 91.
2. The maxim, "Sic utere tuo alienum non lædas," applies to adjoining owners of land, each of whom must respect the valuable rights which accrue to the other from the relative situation of their lands, *e. g.*, in respect to the flow of surface water from one upon the other. *Boyd v. Conklin*, 583.
Memorandum—made by counsel, used in jury room, 506 (2).
of register of deeds, as evidence, 105 (4).
Merger—in deed of negotiations for sale and bond, 83 (5).
of debt in joint judgment in justice's court, 647 (4).
Mines and mining—powers of general agent of mining company, 122 (1).
whether personal property about a mine is a fixture, 122 (3), 249.
Misfeasance—distinguished from nonfeasance, 105 (7).
Monuments—evidences of, in action of ejectment, 83 (6), 140 (3), 246 (4).

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MORTGAGE.
1. A transfer of land cannot be treated in an appellate court as by way of security if the jury below has found it to be a sale. *Stanley v. Nye*, 278.
2. A chattel mortgage is invalid if instead of being taken as security it was taken to prevent the vendor of the mortgaged goods from recovering them or their value. *Robinson v. Walsh*, 506.
3. Payment of incumbrances under an explicit verbal agreement that the incumbered property shall be conveyed to the person paying them, may be ground for subrogating him to the rights of the incumbrancer to the extent of the payment, but subject to such rights as may have arisen meanwhile. *Kelly v. Kelly*, 30.
4. The mere expectation of an inheritance cannot constitute any such consideration for the payment of incumbrances thereon, that the fear of having this expectation disappointed by the possible advent of other heirs can be made a ground for subrogation to the liens discharged. *Id.*
5. Where a mortgager is an employee of the mortgagee, and the latter's agent keeps the accounts, and it is understood that moneys coming through him to the mortgager are to be applied on the mortgage, the mortgagee, to entitle himself to a decree on foreclosure, must make a clear case and a full exposition of the accounts, especially if several years have been allowed to pass without attempting to enforce payment, or to secure it except by labor. *Webber v. Ryan*, 70.
6. Re-opening a foreclosure sale is so far within the discretion of the trial court that the Supreme Court is not disposed to disturb an order permitting it, where the discretion has not been abused. *Nugent v. Nugent*, 557.
7. A foreclosure sale may properly be re-opened for want of notice of the order for sale, or of the confirmation thereof, and for gross inadequacy of price, especially if the petitioner for a re-sale gives bonds to produce a purchaser at a higher price. *Id.*
8. Where a mortgagee is the purchaser on foreclosure, and the sale is objected to for inadequacy of price, objections to re-opening it are open to scrutiny. *Id.*

defense to foreclosure for fraud in compromise, 210 (1).
for purchase money in relation to adverse possession, 261 (4).
laches in filing bill to set aside mortgage, 511.
lis pendens as notice of cross-suit for foreclosure, 625 (7).
on lands afterward taken as by pre-emption, 635.
on testator's estate; residuary legatee, 547 (2).
outlawry of note does not prevent foreclosure, 70 (1).
whether bill of sale was meant as chattel mortgage, 347 (2).

Motion—for order to show cause against transfer of case, 237.
to dismiss proceedings for possession of land, 80.
Motive—for homicide; evidence of, 457 (4).
Multifariousness—not considered in overruling general demurrer, 112.

MUNICIPAL CORPORATIONS.
1. Moneys raised by road-district taxes as a special fund established by legislation for the construction of State roads are not county moneys though placed in the county treasurer's hands for safe-keeping. *Alcona County v. White*, 503.
2. Moneys raised by tax upon a township for a work of internal improvement, and to be applied thereto by a State Board, are not township moneys, even though the township treasurer is the officer designated by law to collect them; and the treasurer and not the township is liable for them if collected. *Anderson v. Hill*, 477.

Murder—libelous accusations of, 457 (1, 2, 7).
Mutuality—essential to contract, 522 (2).

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Name—attached to certified transcript of justice's judgment, 647 (2, 3).
doing business under similar name, 215 (2).
in affidavit for taxation of costs, 805 (1).
of witness, in notice for taking depositions, 92 (4).

NEGLIGENCE.

1. A street railway company is bound to exercise such care and diligence in clearing its track of snow as not to interfere needlessly with the safety and convenience of persons lawfully using the street; and if an extraordinary snow-fall takes place it must make extraordinary efforts to dispose of it. *Bowen v. Detroit City Railway*, 496.
2. In an action for injury the courts cannot go back of the proximate cause, and as between other causes preceding that, select one rather than another upon which to permit a recovery. *Lewis v. Flint & Pere Marquette Railway*, 55.
3. A railway passenger was carried a little past his station on a dark night, and on leaving the train was misinformed by the conductor as to where he was. He soon discovered that he was south of a cross-road he meant to take in going home, instead of north of it as he was told when he landed. He knew the neighborhood and knew that where the road crossed the track there were cattle-guards and culverts on both sides of it. If he had landed where he was told he had, he had meant to follow the track south to the road and pick his way across the culvert though he might have shunned it by taking a side path. In approaching the road from the south he determined to cross the other culvert in the same way, and it is not clear that on that side of the road he could have done any better. But when he neared the cattle-guard, his eyes deceived him and his foot slipped, and in trying to regain his balance he fell into the culvert, which he supposed was farther off, and was seriously hurt. *Held*, that the company's negligence in carrying him past the station and in misinforming him was not the proximate cause of the injury, which was purely accidental, and he could not recover for it. *Id.*
4. Special questions requiring the jury in an action of negligence to specify what defendant did or omitted, are erroneous; if the jury is satisfied that he was wanting in care plaintiff is entitled to their general verdict. *Peer v. Ryan*, 224.
5. One who is injured by the wrongful or negligent act of several persons can sue them jointly or severally as he pleases. *Patterson v. Wabash, St. Louis & Pacific Railway*, 91.
6. The owner of a stallion was sued for the value of a mare that was ruined by service per rectum. *Held*, error to require plaintiff to show that such service was due to defendant's negligence; the inference would be that it was. *Peer v. Ryan*, 224.
7. Record entries in the office of a register of deeds, whether in his own handwriting or not, are competent evidence in an action against him for negligence in failing to give information of the matters of record. *Smith v. Holmes*, 105.
8. A memorandum upon an abstract of title in the words "examined to date, Nov. 15, 1875," and signed by the register of deeds, whether a certificate or not, is admissible as res gestæ in an action against the register for negligence in carrying out an agreement to furnish a full abstract. *Id.*
9. A brakeman's admission that he caused a railway accident, is inadmissible as res gestæ in an action arising therefrom against the company by which he is employed, if his statement was not made in the execution of his duty or while the act to which it referred was in progress; nor can it bind the company as the admission of an agent, if it does not appear that the act done was in the line of his duty. *Patterson v. Wabash, St. Louis & Pacific Railway*, 92.

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10. After a railway accident caused by a misplaced switch a person purporting to be a brakeman declared that he had caused it and had opened the switch. *Held*, that evidence of this declaration would be no better than hearsay as to the fact about the switch. *Id.*
11. In an action for injury the neglect of any precaution by the plaintiff can only raise a question of contributory negligence for the jury. *Lewis v. F. & P. M. Ry.*, 55.
12. The wife of a man who was employed by a railroad company, in taking her husband his dinner had occasion to cross half a dozen busy tracks that lay side by side. In stepping out from behind some cars that stood on one of the tracks she was struck and injured by an engine on the next track, that was backing down in front of her and across her path. *Held*, that whether or not the railway company was negligent in running the engine at a prohibited rate of speed or in failing to ring its bell, the woman was not exercising ordinary care and could not recover for the injury to which she had contributed by her own negligence. *Psolla v. Michigan Central Railroad*, 273.
in relying upon expression of vendor's opinion, 186 (5).
in use of right of way by railroad company, 91 (2).
of drivers; injury resulting therefrom, 73 (1–4, 6).
of lessee of railway track; remedy, 91 (3).
of register of deeds in giving abstract of title, 104 (1), 105 (2, 3).
statement of cause of action in case of negligence, 105 (5, 7).
Newspaper—action against newspaper for libel, 457 (1, 2, 5–8, 10, 11).
NEW TRIAL.
1. Where a case is left to the jury on the question of damages only the verdict must stand unless a sufficient justification appears from defendant's showing. *Davis v. Burgess*, 514.
2. Objections to the validity of proceedings involved in a suit cannot be raised in a later case if purposely withheld or reserved in the first one. *Clark v Wiles*, 323.
denial of costs in granting new trial, 324 (5).
in ejectment, for disregard of monuments, 140 (3).
Next friend—action by; amendment of statement as to plaintiff, 593 (1).
Non-appearance—in replevin suit; election of judgment for value, 288.
on appeal, for want of notice, 130 (1, 2).
Non-feasance—distinguished from misfeasance in declaration, 105 (7).
Non-payment—of fees on appealing from a justice, 242.
Non-performance—of contract, justification therefor, 552 (2).
Non-resident—tax levied for township drain, on non-residents, 551 (2).
NONSUIT.
Whether nonsuit can be taken after set-off has been pleaded and defendant has claimed judgment for a balance—Q. Order permitting it affirmed by equal division. *Merch. Bank of Canada v. Schulenberg*, 49. [Act 123 of 1885 now forbids such nonsuit unless defendant consents.]
Notice—for taking deposition; name of witness, 92 (4).
necessary in township drain proceedings, 551 (1, 2).
necessary to personal judgment, 265 (2).
of adverse possession in co-tenant claiming adversely, 329 (2).
of claim of title by possession and occupancy, 518 (1).
of order for foreclosure sale, 557 (2).
of petition for appointment of drain commissioner, 608.
of probate proceedings on claims against decedents, 230 (1).
of purpose of terminating lease, 294 (3).
of settlement of case; dismissal of appeal, 130 (1).
of suit, is notice of cross-suit, 625 (7).
of tax to resident owners, by publication, 350 (4).

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to innkeeper of value of baggage, 199 (2).
See Judicial Notice.
Novation—as to railroad aid note, 575 (1).
liability, after alteration of contract, 575 (2).
Nunc pro tunc—acknowledgment of submission to arbitration, 652 (4).

Oath—of arbitrators need not be in writing, 652 (2).
to acknowledgment of submission to arbitration, 652 (4).
Objections—to evidence; denial of motion to strike out, 320 (2)
to petition for removal of cause, 552 (1).
to use in jury room of memorandum by counsel, 506 (2).
to validity of proceedings previously tried, 323 (2).
Obligations—made in consideration of renewal of set-offs, 127 (2).
Obstruction—of ditch or highway by abutting owner, 173 (1, 4).
of public ditch by filling it up wilfully, 270 (5).
of riparian rights to mid-channel, 300 (2).
placed in alley to prevent its use, 466 (2).
to the natural flow of water, 583 (3).
to use of street; duration, 496 (2).
Occupancy—as notice of claim of title, 518 (1).
by husband and wife of latter's land as homestead, 206 (3, 4).
necessary to adverse possession, 466 (3).
of space dedicated as alley not adverse possession, 466 (2).
OFFICE AND OFFICER.
approval of liquor bond by village board, 308.
control of turnpikes; judicial notice, 583 (1).
inquiries as to private business in public suit, 561 (6).
mandamus to compel performance of public duty, 132, 182.
Omission—from abstract of title by negligence, 104 (1).
Opening—foreclosure sale for inadequacy of price, 557 (1–3).
Opinions—expressed by vendor as to quality of goods, 186 (2–6).
Oral agreement—between father and son for transfer of land, 30 (4).
for division of profits in land-sale, 540.
to convey lands to person paying incumbrances, 30 (5).
guaranty of payment of third person's indebtedness, 6.
proof of lease of right of way, 77 (2).
Ouster—a question of fact in action of ejectment, 329 (1, 2).
Outlawry—of note does not prevent foreclosure, 70 (1).
Ownership—claim of ownership as affecting alleged duress, 624 (3).
of property lent by finder; replevin, 114.

PARDONS.
The pardoning power in Michigan belongs to the Governor alone; no judge can exercise it by indefinitely suspending the sentence of a convicted criminal. And the presentation to a judge of any petition for such suspension is a grave impropriety. *People v. Brown*, 16.
Parol—evidence in aid of written contract, 147 (7).
Partial payment—transfer of title on partial payment for goods, 1 (2).
Parties—absence or concealment of; affidavit of publication, 236.
competency to contract, 575 (3).
defendants in resisting possessory suits for devised land, 564 (1).
defendant to injunction against continuing business, 215 (2).
entitled to appeal from order discharging guardian, 325 (1).
intent of parties aided by subrogation, 30 (2).
joinder of defendants in action for negligence, 91 (1).
not served in action before magistrate on joint debt, 647 (1, 4).
stockholders joined with corporation as defendants, 168 (1).
to action for use and occupation of right of way, 77 (1).

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to contract, not liable after its alteration, 575 (2).
to deed; non-existent grantee, 543 (1).
to deed, evidence of acts in explanation of ambiguities, 83 (6).
to fraudulent settlement, only, can avoid it, 625 (4).
to proceeding to dissolve attachment on wife's land, 206 (3).
to railroad aid note; new agreement, 575 (1).
Partition—estoppel of tenant-in-common from asking partition, 294 (4).
of premises held under lease by tenants-in-common, 294 (3).
PARTNERSHIP.
1. A man arranged with a firm that he would buy standing timber and cut, pile and ship it, being paid therefor its cost and a certain sum per thousand; the firm was to sell it, and after paying all expenses was to divide the net proceeds with him equally, and he was to bear half the losses. But he had nothing to do with disposing of it after shipment, and the firm had no control over it before. *Held*, that this arrangement did not amount to a partnership as to the unshipped lumber at least; and the parties concerned could not be taxed as a firm upon such lumber. *Monroe v Greenhoe*, 9.
2. A partner's consent to the cancellation of an insurance policy in which the firm is interested is conclusive on the firm; and a formal surrender of the policy is unimportant, except as evidence of the cancellation. *Hillock v. Traders' Ins. Co.*, 532.
3. An obligation legal in form can be sued at law; and a note by one partner to another, even if made to him as a trustee for the firm's benefit, can be sued at law according to its terms, and the defense that it is a partnership matter must either be made at law or under proceedings brought by defendant in equity to establish it. *Mitchell v. Wells*, 127.
in case of injury done by defendant's servant, 73 (3).
injunction to restrain outgoing partner from doing business, 215 (2).
inventory of property of decedent partner, 265 (1).
joinder of partners in taking out writ of error, 652 (3).
lien of partner on real estate, 30 (3).
submission to arbitration by partner, 652 (1, 3).
Passenger—negligence in landing passenger at wrong place, 55 (1).
PATENTS.
One who has contracted for the right to manufacture under a certain patent is in no position, when sued on the contract, to set up rights under a subsequent patent as a justification for non-performance, or to question the validity of the first patent, especially if fraud in the contract or infringement of patent is not alleged. *Fornerook Mfg. Co. v. E. T. Barnum Wire & Iron Works*, 552.
removal of cause involving patent, 552 (3).
to land, inuring to benefit of mortgagee, 685.
PAYMENT.
Presentation of a bill by a merchant's employee does not warrant the debtor thereon in paying it to him unless it is within the scope of his employment to receive payment; and his mere statement that he is authorized to receive it is not enough, nor is it enough that the bill is in the merchant's handwriting and on one of his bill-heads. *Hirshfield v. Waldron*, 649.
assumption of payment, not compounding felony, 560 (2).
by administrator; time in which to be made, 266 (4, 5).
by county treasurer to his successor, 561 (4–6, 8).
by township treasurer to county treasurer, 561 (8).
evidence of, in absence of receipts, 561 (7).
evidence of payment on claim due from estate, 184 (1).
guaranty thereof where third persons are indebted, 6.

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of fees on taking appeal from a justice, 242.
of general legacies; time for, 617 (1).
of incumbrances, based on expectation of inheritance, 30 (6).
of incumbrances; subrogation to extent of, 30 (5).
of minister's salary by deed of land, 543 (2).
of money for matters provided for by contract, 478 (4).
of money on verbal agreement to sell land, 30 (4).
of mortgage by servant to master, 70 (2).
of paving assessment by lessee, 294 (2).
of taxes as evidence of title, 119 (1).
of taxes as evidence of adverse possession, 340 (2).
when necessary to show transfer of title, 335 (1).
Peace-officer—may arrest for breach of peace toward himself, 514 (3).
PERJURY.
False swearing in one's own defense, if it amounts to perjury, is not excused by the fact that it may have been made immaterial by other testimony whereby the witness had already convicted himself. *People v. Brown*, 15.
Personal business—inquiries thereon in official matters, 561 (6).
Personal injury—proximate cause to be regarded, 55 (1, 3).
to married woman; expense of medical attendance, 73 (5).
to passenger traveling over leased track, 91 (3).
Personal judgment—cannot be based on fictions of law, 265 (2).
Personal liability—for services to third person, 522 (3).
of executrix as security for rights of heirs, 564 (3).
on joint debt released as to defendants not served, 647 (4).
Personal property—conversion by sale on execution, 122 (2).
intent determines whether it is a fixture, 122 (3, 4).
sale of, by general agent of mining company, 122 (1).
surplusage in description on an assessment roll, 641 (3).
Petition—for appointment of special drain commissioner, 608.
for removal of cause; forum for objections, 552 (1).
for suspension of sentence, 16 (5).
Physicians—expense of, care of wife for personal injuries, 73 (5).
liability for medical aid to stranger, 522 (3).
testimony to facts as to patient, 321 (4).
PLEADING.
1. Anything outside of the facts necessary to state a cause of action is surplusage; the necessary facts, however, must be stated. *Smith v. Holmes*, 105.
2. The introduction of the words "falsely and fraudulently" as well as the words "carelessly and negligently" is surplusage in a count the gravamen of which is expressed to be negligence merely. *Id.*
3. The allegation of a non-feasance instead of a misfeasance marks the difference between an allegation of negligence and one of fraud. *Id.*
4. A count in a declaration must be construed as an entirety in ascertaining what its gravamen is. *Id.*
5. A declaration in the name of a guardian was amended after plea by making the ward the plaintiff, suing by her next friend, who was the the guardian aforesaid. The issue was in no way changed, however. *Held*, that the amendment was allowable; and it was not material that no opportunity was given to plead anew if leave was not asked or reason apparent therefor. *Morford v. Dieffenbacker*, 593.
in an action for vendor's false representations, 186 (3, 6).
in proceedings for removal of cause, 552 (1).
in trover for goods obtained by fraud, 232 (1).
joinder of causes of action in declaration, 226 (3).
set-off as affecting nonsuit, 49.

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statement of changes in action on aid note, 575 (1).
statement of tort in declaration waiving it, 226 (2).
variance as to consideration in action for fraudulent sale, 186 (2).
Pleading over—in case of amendment not changing issue, 593 (1).
Possession—as notice of claim of title, 518 (1).
by husband and wife jointly of wife's land, 206 (3, 4).
of docket; certified transcript of judgment, 647 (2).
of real estate by executrix in right of heirs, 564 (1).
of stolen goods as evidence of burglary, 334.
what required for adverse possession, 261 (4), 340 (2), 466 (1, 3).
POWERS.
A testator, after specifying a number of legacies, bequeathed the whole of his estate to two certain persons as executors, in trust for the payment by them of debts, expenses and legacies. The trust duties related to the distribution of the estate, and were not substantially different from those of executors. To one of the executors he had made a specific bequest. He also empowered them to employ a certain person as counsel. He afterward, by codicil, revoked the specific bequest to the executor and appointed in his stead the person named as counsel, adding that it was his intention to so change his will that the superseded executor should not receive any legacy or benefit whatever by virtue thereof. *Held*, that this revoked also his appointment as trustee, and substituted the later appointee to perform the trust duties in his place. *Palmer v. Keam*, 617.
of agent of assured person as to proofs of loss, 146 (1, 2).
of circuit judge as to dissolution of attachment, 206 (1).
of disposal under devise of life estate, 594 (4).
of executor; construction of clause giving authority in will, 281 (2).
of general agent of mining company, 122 (1).
of one of several executors to sell realty, 281 (1).
Practice—appeal from order overruling plea, 115 (1).
appearance of executrix for heirs in condemnation proceedings, 564 (3).
case becomes subject to rules of appellate court, 239 (1).
election between counts; waiver of tort, 226 (4).
extension of time for appealing, 258.
joinder by defendants in action for negligence, 91 (1).
latitude allowed on cross-examination, 320 (2), 457 (9).
notice by lis pendens of cross-suit as well as of suit, 625 (7).
order to take testimony before commissioners, 624 (1).
Preponderance—of evidence as to delivery of deed, 116.
Presumption—as to alteration of entries on business books, 561 (5).
as to application of refunded premium on other insurance, 531 (1).
as to meaning of verdict in replevin, 342.
as to presence of executor before the court, 265 (3).
as to reliance on vendor's representations, 232 (2).
of damage from certain libelous statements, 457 (5).
of fraud, cannot be entertained, 347 (3).
of general agent's power to sell, 122 (1).
of genuineness of signature to transcript of judgment, 647.
of negligence, in action for injury, 224 (2).
of payment by servant of mortgage to master, 70 (2).
of statutory basis for executor's authority, 281 (2).
sustaining action of probate courts, 593 (2).
that money received by widow as executrix is accounted for, 564 (4).
that rulings were supported by evidence, 146 (3), 243 (2).
that title does not pass without delivery, 1 (1).
that village board has done its duty as to liquor bond, 308.
Price—inadequacy of price as ground for re-opening sale, 557 (2, 3).

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PRINCIPAL AND AGENT.
The general agent and manager of a mining company is presumably empowered to sell its personal property. *Scudder v. Anderson*, 122.
admission of brakeman not in line of duty, 92 (6).
agency in fraudulent settlement, 337 (1).
agent of corporation taking appeal, 258.
employee's authority to receive payment, 649.
presumption of general agent's power to sell, 122 (1).
proofs of loss made by agent of assured, 146 (1, 2).
representations of third person as to contract, 147 (7).
transactions as to sale of land as between principal and agent, 540.
whether an agent acts for insurer or assured, 146 (6).
PRINCIPAL AND SURETY.
reliability of sureties on liquor-seller's bond, 308.
surety for executor securing interests of heirs, 564 (3).
Printing—of case imperfectly settled; costs, 130 (2).
Privilege—in newspaper publications, 457 (5, 6).
Probate Court—appointment by judge of special drain commissioner, 608.
probate courts in Michigan; jurisdiction, 593 (2).
guardian entitled to petition for, 594 (3).
license to administrator to sell land, 340 (1).
proceedings to enforce claims against decedent's estate, 230 (1).
Profits—division of profits not amounting to partnership, 9 (2).
Promissory Notes: See BILLS and NOTES.
Proof—of facts constituting tort that is waived, 226 (2).
Proofs of loss—private examination of assured person as to losses, 146 (4).
under fire insurance policy; verification of, 146 (1, 2)
Prosecuting Attorney—inducements to accused to plead guilty, 15 (4).
Protest—action to recover tax paid under protest, 641 (3).
Proximate cause—in railway injury, 55 (1, 3).
of loss in action for fraudulent representations, 186 (6).
Publication—affidavit of, in chancery, 236.
constructive notice of tax to resident owners, 350 (4).
PUBLIC LANDS.
The purchaser of land paid part of the purchase price and for the rest gave notes secured by a mortgage on the land. Indorsed on the mortgage was a stipulation that it should not be foreclosed until the mortgagee had removed all clouds on the title. The land was part of a railway grant which reverted to the Government and was released by Congress to the State. During his occupancy the purchaser obtained a deed from the railway company to strengthen his title, and when the holders of the mortgage sought to remove the cloud, as they did at the earliest opportunity, he refused to permit them to do so in his name, and the attempt failed in consequence. Meanwhile, relying on his two deeds and his possession, he took a patent to it himself as pre-emptioner. *Held* on a bill to foreclose that he was estopped from relying on the stipulation, as he had tried to prevent its fulfillment; *also*, that his patent inured to the benefit of the mortgagee, the more so, as the mortgagee's deed enabled him to obtain it. *Haney v. Roy*, 635.

Question of fact—as to contributory negligence, 55 (4).
as to intent that title shall pass without delivery, 1 (1).
as to soundness of horse warranted by vendor, 609 (2).
whether bill of sale was meant for chattel mortgage, 347 (2).
whether servant is acting within scope of duty, 73 (4).
whether vendor's expressed opinions are known to be false, 186 (5).
ouster a question of fact in ejectment, 329 (1, 2).

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reputation for chastity in action for seduction, 320 (6).
Question reserved—in one suit, not to be raised afterward, 323 (2).

RAILROAD COMPANIES.
1. A railroad company is required to fence its right of way so that cattle can not come upon it. How. Stat. § 3377. *Held*, that where a company had acquired a right of way across a farm and had taken down the fences already on the premises, it was liable for injuries done to the crops by cattle which had come upon the right of way and had escaped therefrom upon the farm. *Pound v. Pt. H. & S. W. Ry.*, 13.
2. A railway company's liability for an injury done to crops by cattle that have gone upon the premises in consequence of the company's neglect to fence its right of way, is not changed by the fact that the road was at the time in the hands of a contractor who had nothing to do with the fencing. *Id.*
3. A railway passenger traveling over a leased track has no contract relations with any other lessee of the track than the company which carries him; and if he is injured in consequence of the negligence of some other lessee in its use of the track his only remedy is by an action in tort for the latter's breach of its duty to so use it as not to injure him. *Patterson v. Wab., St. L. & Pac. Ry.*, 91.
bound by maxim sic utere tuo allenum non lædas, 91 (2).
injury to person on track; liability for medical aid, 522 (3).
negligence in depositing passenger, 55 (1).
negligence in keeping track clean, 496 (1).
negligence in misplacement of switch, 92 (6, 7).
negligence in running at unlawful speed, 273.
railroad aid note; construction of, 575 (1).
taxation of rolling stock, 641 (1–3).
Ratification—of agent's action with respect to written contract, 147 (7).
of partner's act in submitting to arbitration, 652 (3).
Real estate—possession of, by executrix, in behalf of devisees, 564 (1).
requirements of equitable lien upon, 30 (3).
sale of, by executors under testamentary authority, 281 (1).
when not to be sold for devisee's support, 594 (4).
Reasons—for instructions to jury, immaterial, 119 (2).
RECEIPTS.
1. A receipt which states its purpose to be for a complete settlement, and which covers the whole period of dealing, is equivalent to an account stated; and though it is open to explanation as to errors or omissions, it cannot be treated as if it had not been meant to cover everything. *Houghton v. Ross*, 335.
2. Receipts relied upon by a defendant in assumpsit as covering the money sued for must be produced; or sufficient reason must be given for not producing them, as a foundation for secondary evidence. *Van Ness v. Hadsell*, 561.
disputing book entry showing receipt, 561 (8).
estoppel by, from denying payment, 561 (8).
entries in register's books, as evidence, 105 (2, 3).
evidence of title to sustain bill to enjoin ejectment, 518 (3).
Records—must be open to public inspection, 132.
of proceedings of State road commissioners, 503 (2).
presumption of evidence in support of rulings, 146 (3), 243 (2).
Refusal—of request to charge not based on evidence, 610 (6).
Register of Deeds—entries in register's books as evidence, 105 (2, 3).
negligence in abstract of title, 104 (1).
Relation—of offense to time of beginning, 496 (2).

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Release—of claim of equities brought about by duress, 624 (3).
RELIGIOUS SOCIETIES.
1. A religious society that in good faith has exercised corporate powers for ten years must be treated as a legal incorporation even though the proceedings taken to incorporate it were in themselves fatally defective. How. Stat. § 4649. *Ionia Congregational Church v. Webber*, 571.
2. Episcopal churches are forbidden by law to acquire title to land until their articles of organization are recorded. How. Stat. § 4661. But the grantees of certain land deeded it as a church site for the use of a congregation that did not organize until several years afterwards. After it was organized, however, the rector, who knew the facts, took from the successors of these persons, who were then the vestry of the church, a deed to a part of the land in satisfaction of a claim he had for unpaid salary. *Held*, that he was thereby estopped from afterwards suing the church for the amount unpaid, and the members of the vestry who had given the deed were also estopped from claiming that the amount had not been paid. *Skinner v. Grace Church*, 543.
Removal—of cause; denial of application therefor, 237.
of goods, unnecessary to conversion, 122 (2).
of obstructions in highway, 496 (2).
of trade fixtures before termination of lease, 249.
Renewal—of set-offs, as consideration for debt, 127 (2).
Renunciation—of trust by executor; power of co-executor to sell, 281 (1).
Repeal—of statute by necessary implication, 168 (2, 3).
REPLEVIN.
1. Demand is necessary before bringing replevin for an article which defendant has borrowed from one who did not know whose it was and did not claim ownership, but who found it on his premises, where it had been put for safety long before by another stranger to the title who found it exposed near by. *Becker v. Vandercook*, 114.
2. Election to take judgment for value in replevin before a justice, cannot be exercised, as matter of right, after an adjourned day on which the plaintiff discontinued and defendant did not appear. *Stack v. Smith*, 238.
3. The purchaser of goods had to replevy them from an officer who took them on an attachment against the vendor. The sale embraced transactions beginning Jan. 6, and closing on the 9th or 10th. The levy was made June 10. Under a charge that unless the sale was made before the levy defendant was entitled to a verdict, the jury found for plaintiff. *Held*, that it must be assumed that they found the sale to have been completed on the 9th, if such assumption were necessary to sustain the verdict.

And if the case was so submitted that the jury might have found that the sale was completed on the 6th, although the facts were not sufficient to establish it, the verdict must stand if no instruction was asked for as to the effect of what took place that day, and if no exception was taken on the specific point that the evidence was insufficient to show a completed sale at that time. *Sandler v. Bresnaham*, 342.

by purchaser for goods not belonging to vendor, 337 (1).
Representations—as to reliability; responsibility for, 210 (2), 232 (2).
Repugnancy—between statutes effecting repeal, 168 (2).
Reputation—as evidence of boundary, 139 (1).
as evidence of surveyed lines, 140 (3).
for chastity, in action for seduction, 320 (6).
Requests to charge: See TRIAL, 1–4.
Rescission—of contract for sale of land, 119 (1).
of sale; use of property after discovering defects, 210 (3).

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Res gestæ—brakeman's admission as to accident, 92 (6).
memoranda of register of deeds, 105 (4).
Residuary legatee—administration closed by filing bond of, 547 (4).
payment of mortgage on testator's estate, 547 (2).
proceeding by general legatee upon bond of, 547 (1).
Res judicata—conclusiveness of judgment on equal division, 350 (4).
decree sustaining validity of drain proceedings, 323 (1).
Revocation—of appointment of executor and trustee, 617 (2).
Review—of assessment for over-taxation, 641 (3).
Revival—of guardianship after release of ward, 325 (1).
Right—of abutters to have access to highway, 173 (1, 4).
Right of action—based on statute; burden of proof, 270 (1).
cannot rest on a wrong to another, 625 (6).
Right of way—defenses to action for use and occupation thereof, 77 (1, 2).
obligation of railway company to build fences, 13 (1, 4).
to be so used as not to injure others, 91 (2).
Riparian rights—claim of, to middle of channel, 300 (2).
Road—taxes for construction of roads not county moneys, 503 (3).
Rules—of practice; delay caused thereby as affecting jurisdiction, 239 (1).
(For references to Court Rules see the table at the end of this Index).

SALE.

1. Title may pass without delivery, if the property sold is sufficiently identified and even if something remains to be done to fit it for delivery. *Byles v. Colier*, 1.
2. The presumption that title does not pass upon a sale so long as anything remains to be done to determine the sum to be paid, is not conclusive, but may be overcome by such facts and circumstances as indicate a contrary intent in the parties, and the intent is a question of fact and not of law. *Id.*
3. H and W were employed in a lumber business and W went to Canada for teams. H owned a span of gray mares, which he asked W to bring when he returned. W found the expense of bringing them too great and sold them, but told H, on returning, that he had a team of black ponies that would suit him. He did not say, however, that he had traded the grays for the blacks. *Held*, that without some agreement of sale, carried out by payment of price or earnest money or by delivery, there was not enough in the evidence to show a transfer to H of the title to the ponies. *Houghton v. Ross*, 335.
4. Where money has been paid upon a sale of personalty that has been set apart for the purchaser by examination and estimate of its quantity, the fact that it must be further inspected in order to determine how much remains to be paid, is not inconsistent with the purpose that the title should pass upon the partial payment. *Byles v. Colier*, 1.
5. The delivery made upon the sale of goods is sufficient, if it is all that the contract of sale contemplated. *Id.*
6. A sale of chattels by a debtor cannot be impeached for want of delivery if they are already under the purchaser's control, as, *e. g.*, where the debtor is the purchaser's son-in-law and is indebted to him, and the chattels are in a building belonging to the purchaser's wife and to which he has the key. *Edwards v. Edwards*, 347.
7. A warranty of the soundness of a horse, unless expressly restricted, extends to all manner of soundness, whether known to the vendor or not, and the question whether the animal was in any way unsound at the time of sale is for a jury. *Van Hoesen v. Cameron*, 609.
8. One who enters a vessel on a ship-broker's books as for sale is responsible for the correctness of the data of description there appearing if they were meant to be relied on and were relied on. *Gilchrist v. Manning*, 210.

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9. In trover for goods sold upon representations by the purchaser as to his solvency, the jury have no right to assume that the plaintiff did not rely on the representations in making sale, if there is testimony to support his claim that he did, and none to the contrary. *Heineman v. Steiger*, 232.
10. One who sues on a warranty of the soundness of a horse can show by the testimony of a former owner that the horse while owned by him was diseased, if the disease was one which might have resulted in subsequent unsoundness. *Van Hoesen v. Cameron*, 609.
11. In an action upon a warranty the allowance of a hypothetical question which did not relate to the condition of the article sold at the time of the sale was held to be cured by a cross-examination which supplied the omission and placed all the facts necessary to the formation of an opinion before the witness. *Id.*
12. The continuous use which the purchaser of a vessel may be compelled to make of it after discovering defects does not waive damages to which he is entitled therefor, whatever effect it may have on his right to a rescission. *Gilchrist v. Manning*, 210.
13. It is error to submit the question whether a bill of sale was meant as a chattel mortgage if there is no evidence tending to show it. *Edwards v. Edwards*, 347.

by administrator; purchaser's title, 340 (1).
by one of several executors, where the rest refuse to act, 281 (1).
conclusiveness of finding as to nature of, 278 (2).
effect of verdict as to sale in action of replevin, 342.
for mere nominal purpose apparently fraudulent, 594 (5).
of "good-will," basis therefor, 215 (1).
of good-will preventing continuance in business, 215 (2).
of land; rescission of contract therefor, 119 (1).
of land or landed interest by oral agreement, 30 (4), 540.
of land on execution; denial of its validity, 80.
of lands of resident owners on constructive notice, 350 (4).
of property wrongfully in vendor's hands, 337 (1).
of real property for support of devisee, 594 (4).
on execution, amounting to conversion, 122 (2).
on false representations; trover for goods, 506 (1).
on foreclosure to person holding adverse possession, 261 (4).
on foreclosure; re-opening thereof, 557 (1-3).
merger of negotiations in deed includes bond for transfer, 83 (5).
negligent omissions from abstract of title, 104 (1).
power of sale in general agent of mining company, 122 (1).
taxation of property in process of transfer, 228.

Secondary evidence—foundation for evidence of payment, 561 (7).
Security—transfer of land by way of security, 278 (2), 506 (3).

SEDUCTION.

1. Error cannot lie in an action for the seduction of a minor upon the allowance of a question to the child's mother as to her knowledge of the time when her daughter went to see a physician, especially if the answer was immaterial and not prejudicial. *Dalman v. Koning*, 320.
2. Damages in an action for seduction may be as heavy where the act was without force as where it was with it. *Id.*
3. In an action for seduction the victim's reputation for chastity is a question for the jury. *Id.*

contradiction of witness as to impertinent facts, 320 (2).

SEIZIN AND DISSEIZIN.

1. Ouster is a question of fact in an action of ejectment, and the burden of proving it is on the party who alleges it. *Highstone v. Burdette*, 329.

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2. In ejectment between grantees of tenants-in-common defendant claimed title by adverse possession, and asserted that his entry under a warranty deed was an ouster of the co-tenants. There was evidence to show, however, that he only bargained for an undivided interest, and there was nothing to show that the co-tenants knew of his possession or claim of title. *Held*, for the jury to determine whether he entered claiming title to the whole, and intending to oust his co-tenants. *Id.*
3. Where the parties in ejectment, being co-tenants, rely upon an ouster, and the defendant claims title by adverse possession, the plaintiff has the burden of showing that he was ousted within the period of the statute of limitations, and the defendant of showing that he had ousted the adverse claimant so long before that the period of limitation had run since. *Id.*

Sentence—suspension of sentence indefinitely, improper, 16 (5).
of imprisonment; delay in enforcement, 239 (2).
Separation—of married persons differs from desertion, 492 (1, 2).
Service—of every defendant in suit on joint debt, 647 (1, 4).
of notice that deposition will be taken, 92 (5).
SET-OFF AND COUNTER CLAIM.
1. Where part of the consideration for a transfer of land was the settlement of claims outstanding against the grantor, the transferee could not, in an action against him for the money consideration, set off the amount of such claims settled by him before the transfer. *Stanley v. Nye*, 278.
2. The burden of proving set-offs is always on the defendant who desires to establish them; and it does not fall on plaintiff even where the suit is on an obligation that has been received in consideration of the renewal of the set-offs. *Mitchell v. Wells*, 127.

taking nonsuit after set-off is pleaded, 49.
Setting aside—decree for errors in admitting evidence, 518 (2).
deed or mortgage; laches, 511.
judgment on plea of guilty, 15 (6).
verdict in justice's court not to be set aside, 302 (2).
SETTLEMENT.
1. A transfer of land for less than its value is a legal consideration for an agreement by the transferee that he will settle certain claims arising out of mutual transactions and standing against the person making the transfer. And it is immaterial whether the claims so disposed of were binding obligations or not. *Stanley v. Nye*, 277.
2. A man sold a sailor a rotten old boat, which was described on the ship-broker's books as possessing various virtues that it did not have. The sailor and his wife gave back a mortgage on the wife's house. The boat's defects were not so apparent but that the sailor used her for a long time in the hope that he could make her do, but she was too unseaworthy, and he suffered great losses. The wife saw the man who sold the boat and claimed that part of the notes given him ought in fairness to be given up, and he referred her to his lawyer, but instructed the lawyer not to give them up until she signed a receipt for all claims resulting from the sale. She would not sign at first, and only did so on the lawyer's assurance that if she did not mean to bring a suit, signing would make no difference to her. *Held*, that this advice was not true in law, as it took account of actions only, and not of defenses; the compromise therefore could not prevent the sailor and his wife from resisting foreclosure on the grounds of a want of consideration and of fraud. *Gilchrist v. Manning*, 210.
3. A fraudulent settlement is voidable only, and that by a party thereto and not by a stranger. *S. C. Hall Lumber Co. v. Gustin*, 625.

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4. A lumberman's employee asked the foreman to bring a span of gray mares which he owned, from a distant point, but the foreman sold them, and on his return indicated a span of French ponies which he had brought with him, and which he thought would be satisfactory in place of the mares. It did not appear, however, that the mares had been exchanged for the ponies. The lumberman afterwards sold out and the ponies were included in the sale. The employee took possession of them and the purchaser sued him in replevin. The foreman, who was not employed by the purchaser, was a witness for the plaintiff, and was cross-examined as to whether he had not evaded a settlement with the owner of the mares. *Held* error to so charge the jury as to leave them to infer that the foreman was the purchaser's agent, and that the purchaser was interested in the attempt at a settlement and was involved in any trickery connected therewith. *Ross v. Houghton*, 337.

between widow as executrix and heirs, 564 (4).
by receipt, establishing account stated, 335 (2).
consideration therefor in transfer for less than value, 277 (1).
of case, want of notice thereof, 130 (1).
of claims for transfer for less than value, 277 (1).
of claims in consideration of transfer of land, 278 (3).
of county treasurer with county, 561 (1, 3–6, 8).
of estate, use thereof pending, 344.
remand of case for settlement, costs, 130 (2).
Sharing—in profits, not amounting to partnership, 9 (2).
Sheep—double damages for killing sheep by dogs, 304.
Sheriff—presence in jury room as invalidating verdict, 302 (3).
Ships and shipping—description of vessel entered for sale, 210 (2).
Solvency—representations by vendor as to his solvency, 232 (2).
Special commissioner—to lay out State roads, 503 (2).
Special drain commissioner—appointment of, by probate judge, 608.
Special damages—verdict covering question of, 324 (3).
Special questions—to jury as to specific acts of negligence, 224 (3).
submission of special questions to jury in action for libel, 457 (11).
when answer is immaterial, 457 (3).
Speed—in running railway trains, 273.
Stare Decisis—conclusiveness of judgment on equal division, 350 (4).
Statement—of cause of action; necessary averments, 105 (3, 5, 7).
of party, in declaration; amendment as to, 593 (1).
Statute of Frauds: see FRAUDS, STATUTE OF.
Statute of Limitations: See LIMITATION OF ACTIONS.
STATUTES.
1. Statutes can only be repealed by express subsequent enactment, or by the necessary implication from a positive repugnancy to the provisions of a later act; but in the latter case the repeal is only to the extent of the repugnancy. *Connors v. Carp River Iron Co.*, 168.
2. Repeals by implication are not favored. *Id.*
acts authorized by statute will not support damages, 173 (3).
as to turnpikes; judicial notice thereof, 583 (1).
title not covering provisions, 478 (3).
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Stay of execution—not caused by intent to appeal, 318 (1).
to take out writ of error in criminal case; delay, 239 (2).
Stipulation—estoppel from reliance on, after trying to defeat it, 635.
in insurance policy for private examination as to losses, 146 (4).
Stockholders—as defendants in action against corporation, 168 (1).
Storage—taxation of merchandise in storage, 9 (1), 228, 641 (3).
Streets—use of indecent language in public, 514 (2).
use of streets for track of street railways, 496 (1).

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Striking out—testimony where no objection was made, 320 (2).
Submission—by partner to arbitration, 652 (1, 3).
Subrogation—application and purpose of the doctrine, 30 (2).
to extent of payment of incumbrances, 30 (5, 6).
Summary proceedings—to recover possession of land, 80.
Supersedeas bond—releasing attached goods; costs, 306 (3).
Supervisors—clerk of board may sue out certiorari, 503 (1).
report of road commissioners to board of supervisors, 503 (2).
Suppression—of depositions prematurely taken, 624 (2).
Surplusage—in description of personalty in assessment roll, 641 (3).
in statement of cause of action, 105 (3, 5).
Surrender—of insurance policy on cancellation, 532 (3).

SURVEYS AND SURVEYORS.

1. All subdivision lines of a section of land according to government survey must run straight from a point in one exterior line of the section to the corresponding point in the opposite boundary. *Wilson v. Hoffman*, 246.
2. A map of a government subdivision is inadmissible in evidence without the surveyor's field-notes. *Id.*
3. Old surveyed lines which have become uncertain are not to be superseded by new ones, but are to be ascertained by a re-survey, if rights have become fixed and regulated in reliance upon the common understanding as to where they lie. *Baker v. McArthur*, 140.
4. Two official surveys having resulted differently the question in ejectment was the real location of a section line. *Held* proper to show that a surveyor who had helped to run the original line, had again run it in laying out village lots, while the corner post and witness-trees were still standing; and that afterwards a grantee had built a fence along the line so run, and this fence was understood in the neighborhood to indicate that line. *Id.*
5. A re-survey was had when the evidences of the original survey had nearly disappeared, and a question afterwards arose as to where the true line was. The boundaries of property conveyed before the re-survey were not to be disturbed. *Held* proper to show that lots had been laid out and buildings put up with reference to the line as established by the first survey, and that it had been shown by a recent survey that the line as run by the re-survey would cross lots and bisect buildings. *Id.*

monuments as evidences of surveyed line, 140 (3).
survey of ditch different from that petitioned for, 270 (2).
Suspension—of sentence for indefinite period improper, 16 (5).

TAXES.

1. The constitutionality of the General Tax-law of 1882 was questioned in the circuit courts for the counties of Marquette and Wayne. In one it was sustained and in the other denied. Upon review the Supreme Court was equally divided in each case, so that neither judgment was disturbed. *State Tax-Law Cases*, 350.
2. Taxation for a local purpose cannot be sustained if the law authorizing it be unconstitutional, even though the tax be voted by a majority, for so far as the minority are concerned its enforcement deprives them of their property without due process of law. *Anderson v. Hill*, 478.
3. Act 323 of 1881 imposing a tax upon specified townships for the purpose of improving the channel of a stream is void, because it conflicts with the constitutional provision that the State shall not engage in any work of internal improvement unless by granting land therefor. *Id.*

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4. The statutory rule for taxing a car-loaning company or the owner of a special freight line (How. Stat. § 1229) does not apply to the owner of cars that are used in his own business, even though the railroad company over whose road they run makes the owner an allowance for "wheelage." *Comstock v. Grand Rapids*, 641.
5. The owner of railroad cars is not exempt from taxation thereon on the ground that the companies over whose roads they run pay taxes on their earnings. *Id.*
6. Lumber that is brought to a railway station for transit merely, and is kept there in piles for convenience of shipment upon grounds that are neither owned nor hired for the purpose, is not taxable at that place as property in storage. *Monroe v. Greenhoe*, 9.
7. Lumber upon the premises of the manufacturer and under a contract of sale to dealers whose place of business is elsewhere, is not taxable where it is, as if in a place of "storage," especially if anything remains to be done to complete the transfer to the purchasers. *Osterhout v. Jones*, 228.
8. A manufacturer lived in one ward and had a warehouse and stock-in-trade in another, and he also had a number of railway cars which he used in the transportation of his manufactures. The cars were taxed in both wards. *Held*, that they were properly taxable with the stock-in-trade as appurtenant to the business; and as personal property is assessable in gross and specific description of it is surplusage, the enumeration of the cars on the tax-roll could not affect the validity of the assessment, and if it was excessive the owner's remedy was by appeal to the board of review and not by a suit to recover taxes paid under protest. *Comstock v. Grand Rapids*, 641.
9. Whether the lands of resident-owners can be sold for taxes upon merely constructive notice to them by publication—Q. *State Tax-Law Cases*, 350.
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TRESPASS.

1. Persons whose duty it is to run a drain must keep within the limits of the land taken for the purpose; if they throw out dirt upon adjacent land it is a trespass. *Clark v. Wiles*, 824.
2. One who buys lots which his deed describes according to a recorded plat is estopped from disputing the dedication and acceptance of an alley which appears thereon as bounding his lots and passing between them; and a mere occupancy by him of the space designed for the alley, without claim or color of title, does not establish an adverse possession until the interests of some one else are affected by it, nor will it entitle him to maintain trespass against a neighboring lot-owner for driving through the alley and tearing down obstructions placed there to prevent his using it. *Marble v. Price*, 466.
3. Defendant in a suit for trespass upon land belonging to an estate in process of settlement, justified under an agreement which he claimed to have made with decedent's widow that he might use the land for a year or until the estate should be settled. There was evidence tending to show that it might be settled within a year. *Held*, that a charge that plaintiff could not recover if the jury should find that defendant was to have the use of the land while the estate was being administered, was erroneous; the question should have been submitted whether the arrangement was to last until, or end with, the settlement of the estate, irrespective of the time it should take to settle it. *Patterson v. Patterson*, 344.

TRIAL.

1. A request to charge that has no testimony to base it on is properly refused. *Van Hoesen v. Cameron*, 610.

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2. Requests to charge are properly refused if the judge, instead of giving the requests, fully and correctly instructs the jury as to the law applicable to the case. *Pound v. Pt. H. & S. W. Ry.*, 13.
3. An exception to a refusal to charge is too general which states that "the court refused to give any of the foregoing requests, and the counsel for defendant in due time and form excepted to each refusal." *Id.*
4. A judge's reasons for an instruction to the jury are immaterial if the instruction is warranted. *Swain v. Baldwin*, 120.
5. Whether a compromise upon a verdict or the sheriff's presence in the jury room can be noticed on error without some action in the trial court—Q. *Alt v. Lalone*, 802.
6. It is too late to object for the first time in the appellate court, that the jury had taken to their room a memorandum made by counsel. *Robinson v. Walsh*, 506.
7. In trover for goods which plaintiff had sold in reliance on false representations, and defendant had seized upon a chattel mortgage given him for the purpose of defrauding plaintiff, a general verdict in plaintiff's favor covers the questions of defendant's participation in or knowledge of the fraud, if those questions were submitted to the jury. *Id.*
8. Where special damages are claimed and the case is submitted under such instructions as would require the jury to return a verdict therefor if there were any, a verdict for defendant determines that none were suffered. *Clark v. Wiles*, 324.
9. The answer of a jury to a special question is of no account if based on testimony improperly received. *Peoples v. Detroit Post & Tribune Co.*, 457.

suggestions by the court to counsel, 561 (8).

TROVER AND CONVERSION.

1. Trover lies for goods obtained by defendant through fraud or deceit practiced on plaintiff; and the plaintiff need not have accepted every statement as literally true or count on any precise words. And fraud outside of any written statement made, may be considered by the jury. *Heineman v. Steiger*, 232.
2. The sale on execution of personal property belonging to a third person amounts to a conversion, whether the officer making sale removes it or not. *Scudder v. Anderson*, 122.

for goods sold; reliance on representations by seller, 232 (2).
for goods sold on false representations, 506 (1).

TRUSTS.

1. A trustee for the beneficiaries in an insurance policy signed a written acknowledgment that the policy had been cancelled, and in making proof of loss to another company made affidavit that there was no other insurance. It was afterward claimed that he signed these documents without knowing what they contained. *Held*, that they did not estop him from claiming the first-mentioned insurance for the benefit of the cestuis que trustent. *Hillock v. Traders' Ins. Co.*, 532.
2. One who has left moneys in trust in the hands of a person, who has misapplied them, cannot recover them from the latter's assignee or from a third person unless he can substantially identify them in the hands of the person whom he seeks to charge. *Neely v. Rood*, 134.

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WATERS AND WATER-COURSES.
1. A rural land owner has no right to put up such artificial barriers as will flood his neighbor's land with water that would otherwise escape over his own, for the mere purpose of reclaiming the bed of a pond that has always been on his premises, and of getting rid of the inflow. *Boyd v. Conklin*, 583.
2. A bill in equity claimed riparian rights upon a bayou and title to the middle of its channel. These facts being admitted by general demurrer, it was *held*, that complainant could maintain his bill for relief against his grantor if the latter asserted title to the bayou, and so obstructed it by filling it with saw-logs as a booming-ground, that the riparian grantee was excluded from it. *Turner v. Holland*, 300.
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WAYS.
1. Special commissioners, named by statute, to lay out State roads are

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not county officers though required, for purposes of record, to render an account of their proceedings to the board of supervisors. *Alcona County v. White*, 503.

2. A commissioner of highways, or an overseer acting under his direction, incurs no liability to abutting owners if, in the proper exercise of his lawful discretion and for the sole purpose of improving the highway, he runs a ditch in front of their premises which they have to bridge in order to reach the road. *Highway Commissioners v. Ely*, 173.

3. Abutting owners have the right of access to the highway, and one who has been cut off therefrom by the running of a ditch, or the improvement of the road, may bridge the ditch, or grade the approach to his premises; but in so doing, he must not obstruct the ditch or the way. *Id.*

4. In an action for an injury caused by obstructions which in the first instance are lawfully in the street, but which defendant is bound to remove as speedily as possible, it is not necessary to allege that they were left there for an unreasonable time; the offense of leaving them there relates back so that it becomes unlawful from the beginning and the time necessary for their removal is matter of justification and defense. *Bowen v. Detroit City Railway*, 496.

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WILL.

A guardian has such an interest as will entitle him to petition for the probate of a will in his ward's favor; and the probate, if allowed, cannot be collaterally assailed for the want of a showing that he had proved the allegations on which his right to petition was based. *Morford v. Dieffenbacker*, 594.

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WITNESS.

1. A physician may properly testify, with his patient's consent, to the date of a visit made him by the patient and the subject of the consultation, details not being given and the date being only material to fix the time of other events. *Dalman v. Koning*, 321.

2. Where a party has not been limited in his re-examination, the cross-examination thereon may properly be allowed the same latitude. *Peoples v. Detroit Post & Tribune Co.*, 457.

3. Defendant having made an affidavit for a continuance on the ground that his son was a material witness and was absent, was asked on his own cross-examination whether his son was sworn upon the trial of a certain other suit involving the same facts and at which the son was present. *Held*, that this was legitimate cross-examination; and if answered without objection a subsequent motion to strike out the testimony was properly denied, *Dalman v. Koning*, 320.

4. A witness is apt to discredit himself by seeming to remember in minute detail long past conversations between third persons on business matters in which he could have had no interest; especially if it appears that these details had been casually suggested to him some

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time before by a person interested in proving them to be true. *Grosvenor v. Harrison*, 194.
5. Witnesses cannot be impeached by contradiction on matters not pertinent to the issue; so *held*, of the contradiction of a victim of seduction upon matters not touching her chastity. *Dalman v. Koning*, 320.
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